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Land and Environment Court of NSW

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Legislation

Statutes

[Local Government Amendment \(Governance and Planning\) Act 2016 No 38](#) - published 25 November 2016, commenced certain amendments made by the [Local Government Amendment \(Governance and Planning\) Act 2016](#) to the [Local Government Act](#) 1993 that:

- require the Minister for Local Government to give notice to a council of the Minister's intention to appoint a financial controller, when giving notice of a proposed performance improvement order (**improvement order**) for the council;
- enable the Minister to appoint a financial controller to a council if the Minister issues an improvement order for the council;
- enable regulations to be made to establish criteria that must be considered by the Minister in deciding whether to appoint a financial controller to a council;
- provide for the operations of a financial controller once appointed; and
- enable regulations to be made to establish criteria that must be considered by the Minister in deciding whether to appoint a temporary adviser to a council.

The [Strata Schemes Development Act 2015 No 51 \(the SSD Act\)](#) commenced 30 November 2016. The main objects of the SSD Act are to provide for:

- the subdivision of land, including buildings, into cubic spaces to create freehold strata schemes and leasehold strata schemes;
- the way in which lots and common property in strata schemes may be dealt with; and
- the variation, termination and renewal of strata schemes.

The SSD Act provides (in Pt 10 Strata renewal process for freehold strata schemes) that the Court has jurisdiction to deal with strata renewal process where at least 75% of the members of a scheme wish to redevelop or sell for redevelopment but a minority do not wish to do so.

Regulations

- Planning

[Liquor Amendment Regulation 2017 \(the Liquor Regulation\)](#) - published 17 February 2017. The objects of the Liquor Regulation are as follows:

- (a) to modify the circumstances in which the compliance history risk loading element of the periodic fee for a liquor licence is payable,
- (b) to provide that an interim restaurant authorisation (which authorises the sale of liquor in a restaurant pending the determination of a licence application) is not to be issued in respect of a restaurant if an authorisation relating the restaurant has been revoked in the past 12 months or if a licence application has been refused during that period,
- (c) to allow hotels and clubs to trade for extended periods on certain days on which special events will be held,
- (d) to clarify certain matters relating to the conversion of general bar licences or on-premises licences to small bar licences.

[Liquor Amendment \(Special Licence Conditions\) Regulation \(No 2\) 2016](#) - published 25 November 2016, changed the list of licensed premises that are subject to the special licence conditions set out in Sch 4 to the [Liquor Act 2007](#).

[Greater Sydney Commission Regulation 2016 \(the GSC Regulation\)](#) - published 11 November 2016. Under s 18(6) of the [Greater Sydney Commission Act 2015](#), any existing joint regional planning panel that applies to a part of the Greater Sydney Region is taken to be abolished when a Sydney planning panel is constituted for that part of the Greater Sydney Region. The object of the GSC Regulation is to provide savings and transitional provisions consequent on the abolition of the Sydney East Joint Planning Panel and Sydney West Joint Planning Panel as a result of the constitution of the Sydney planning panels by the [Greater Sydney Commission \(Planning Panels\) Order 2016](#).

[Greater Sydney Commission \(Planning Panels\) Order 2016 \(the GSC Order\)](#) - published 11 November 2016. The object of the GSC Order is to constitute six Sydney planning panels for districts of the Greater Sydney Region, namely, the Sydney Central Planning Panel, Sydney West Central Planning Panel, Sydney West Planning Panel, Sydney North Planning Panel, Sydney South West Planning Panel and Sydney South Planning Panel.

- Local Government

[Local Government \(City of Parramatta and Cumberland\) Amendment Proclamation 2017 \(the Parramatta and Cumberland Amendment Proclamation\)](#) - published 24 January 2017. The object of the Parramatta and Cumberland Amendment Proclamation is to constitute wards for the altered local government areas of The Hills Shire and Hornsby, as a consequence of the changes made to those areas by the [Local Government \(City of Parramatta and Cumberland\) Proclamation 2016](#).

[Local Government Amendment \(Amalgamations\) Proclamation 2016](#) - published 7 November 2016, amended proclamations creating new council areas with respect to the continuation of pre-existing rating and charges variations and to provide for the payment of fees to any Administrator of a new council who exercises functions relating to a county council.

[Local Government \(General\) Amendment \(Performance Management\) Regulation 2016](#) - published 25 November 2016, prescribes criteria that the Minister for Local Government is required to consider in deciding whether to appoint a temporary adviser or a financial controller to a council in respect of which the Minister has issued a performance improvement order (and to omit a redundant criterion as a result). These amendments are made as a consequence of the commencement of certain provisions of the [Local Government Amendment \(Governance and Planning\) Act 2016](#).

[Local Government \(General\) Amendment \(Transitional Auditors\) Regulation 2016](#) - published 18 November 2016, amended the [Local Government \(General\) Regulation 2005](#) to modify transitional provisions consequent on the commencement of changes to arrangements for auditing councils.

- Water

The [Water Management \(General\) Amendment \(Licences\) Regulation 2017](#) - published 27 January 2017:

- creates a new category of water access licence (the Penrith Lakes Scheme (initial fill of the lakes that form part of the Scheme) access licence), and declares that type of water access licence to be a specific purpose access licence, for the purposes of the [Water Management Act 2000](#) (the WM Act); and
- provides that an application may be made under the WM Act for that type of specific purpose access licence and a major utility (Barnard) access licence.

- Miscellaneous

[Strata Schemes Development Regulation 2016](#) - published 4 November 2016, made provision with respect to the following:

- the form and content of location plans, floor plans, administration sheets and schedules of unit entitlements that relate to strata schemes;
- the carrying out of development in stages of a parcel subject to a strata scheme;
- the issuing of strata certificates and the giving of certificates by owners corporations;
- the lodgement of plans and documents with the Registrar-General;
- the collective sale or redevelopment of strata schemes under strata renewal plans;
- interests (such as easements) that affect a parcel subject to a strata scheme;
- the designation by a plan of the site of a proposed affecting interest and
- the payment of fees.

Acts assented to but only partially in force

[Crown Land Management Act 2016 No 58 - Div 4.2 \(Vesting of Crown land in local councils\)](#), s 13.5 (Regulations) and Sch 7 (Savings, transitional and other provisions) came into force on the date of assent (14 November 2016). The remaining provisions have not yet come into force.

[Regulatory and Other Legislation \(Amendments and Repeals\) Act 2016 No 60](#) - assented to 14 November 2016. Although some provisions have commenced, those of potential interest to readers of this newsletter – provisions amending s 36(2) of the [Architects Act 2003 No 89](#); cl 15 of the [Architects Regulation 2012](#) and s 21(2)(c) of the [Building Professionals Act 2005 No 115](#) removing the requirement that complaints be verified by statutory declaration – have not yet come into force.

Acts assented to but not yet in force

[Biodiversity Conservation Act 2016 No 63](#) - assented to 23 November 2016

[Local Land Services Amendment Act 2016 No 64](#) - assented to 23 November 2016

[Land Acquisition \(Just Terms Compensation\) Amendment Act 2016 No 59](#) - assented to 14 November 2016, commences 1 March 2017.

Bills

The [Fines Amendment Bill 2017](#) proposes to amend the [Fines Act 1996](#) to allow the Commissioner of Fines Administration:

- (a) to take civil enforcement action against a fine defaulter who is an individual without first suspending or cancelling the fine defaulter's driver licence or vehicle registration, and
- (b) to take enforcement action to recover an amount payable under a confirmed order for restitution made by the Commissioner of Victims Rights against an offender or another person (a restitution amount).

[Aboriginal Land Rights Amendment \(Local Aboriginal Land Councils\) Bill 2016](#), proposes to amend the [Aboriginal Land Rights Act 1983](#) (**the Act**) as follows:

- (a) to authorise the NSW Aboriginal Land Council to make a performance improvement order to a Local Aboriginal Land Council if the NSW Aboriginal Land Council considers that action must be taken to improve the performance of the Local Aboriginal Land Council;
- (b) to restore the authority of Local Aboriginal Land Councils to own and operate corporations;
- (c) to clarify the role and functions of an administrator or interim administrator appointed to an Aboriginal Land Council; and
- (d) to provide for the payment of an interim administrator.

[Biosecurity Amendment Bill 2017](#), proposes to amend the [Biosecurity Act 2015](#) to:

- (a) make provision with respect to fees paid for the preparation of biosecurity certificates;
- (b) to provide for corporations to be accredited as biosecurity certifiers and appointed as biosecurity auditors;
- (c) to ensure that the issue of a biosecurity certificate by a biosecurity certifier, or the conduct of a biosecurity audit by a biosecurity auditor, will be carried out only by an appropriately qualified individual who is the biosecurity certifier or biosecurity auditor or who is an identified individual;
- (d) to permit mandatory grounds for the suspension or cancellation of accreditation as a biosecurity certifier, or appointment as a biosecurity auditor, to be prescribed by regulations under the [Biosecurity Act 2015](#) (**the Principal Act**);
- (e) to ensure that the accreditation of biosecurity certifiers and the appointment of biosecurity auditors by an accreditation authority will be carried out only by individuals notified to the Secretary of the Department of Industry, Skills and Regional Development (**the Secretary**);
- (f) to permit the Secretary to issue evidentiary certificates to facilitate proof of matters relating to the National Livestock Identification System; and
- (g) to provide for the Secretary to make an order that permits an activity that would otherwise be prohibited by a mandatory measure or by a regulatory measure implemented in relation to a biosecurity zone.

State Environmental Planning Policy [SEPP] Amendments

[State Environmental Planning Policy \(Penrith Lakes Scheme\) Amendment 2017](#) - published 20 January 2017. The aims of this Policy are as follows:

- (a) to provide a development control process that ensures that environmental and technical matters are considered in the implementation of the Penrith Lakes Scheme;
- (b) to identify and protect items of the environmental heritage;
- (c) to identify certain land that may be rezoned for employment, environmental, parkland, residential, tourism and waterway purposes and land that will be rezoned as unzoned land,
- (d) to permit interim development that will not detrimentally impact on the implementation of the Penrith Lakes Scheme;
- (e) to ensure that the implementation of the Penrith Lakes Scheme does not detrimentally impact on the ongoing operation and use of Olympic legacy infrastructure, including the Sydney International Regatta Centre and the Penrith Whitewater Stadium; and
- (f) to make changes to the maps in the SEPP.

[State Environmental Planning Policy Amendment \(Sydney Regional Environmental Plan No 26-City West\) 2016](#) - published 16 December 2016, allows for the temporary use of Wentworth Park as a school until 31 December 2019.

The [SEPP \(Sydney Region Growth Centres\) 2006](#) has been amended by the following:

- [SEPP \(Sydney Region Growth Centres\) Amendment \(Miscellaneous\) 2016](#) - published 25 November 2016
- [SEPP \(Sydney Region Growth Centres\) Amendment \(Marsden Park Industrial Precinct\) 2016](#) - published 16 December 2016

Miscellaneous

[Barangaroo Delivery Authority \(Replacement of Map\) Proclamation 2016](#) - published 16 December 2016.

[Liquor Amendment Regulation 2016](#) - published 16 December 2016, amended the *Liquor Regulation 2008* to implement miscellaneous reforms arising out of the Callinan and other liquor law reviews. The reforms include relaxing the existing “lock out” and “last drinks” restrictions in the case of live entertainment venues in the Kings Cross and Sydney CBD entertainment precincts.

[Protection of the Environment Operations \(Hunter River Salinity Trading Scheme\) Amendment Regulation 2016 \(the HRS Trading Scheme Amendment Regulation\)](#) - published 16 December 2016, commencing 16 March 2017, makes miscellaneous amendments to the [Protection of the Environment Operations \(Hunter River Salinity Trading Scheme\) Regulation 2002 \(the HRS Trading Scheme Regulation\)](#) as a result of a review of the HRS Trading Scheme Regulation by the Minister for the Environment. The HRS Trading Scheme Amendment Regulation:

- (a) increases the thresholds at which all sectors of the Hunter River are considered to be in “flood flow” for the purposes of the tradeable emission scheme established by the principal Regulation;
- (b) requires discharge licence holders, as a precondition to the use of credits in the scheme, to nominate an authorised discharge point to which those credits are assigned (as discharge licence holders may be authorised to discharge saline water into the Hunter River catchment from multiple authorised discharge points specified either in the one discharge licence or in multiple discharge licences);
- (c) enables the Environment Protection Authority (EPA) to apply proceeds from auctions or sales of credits that exceed the costs of the scheme in any year towards the costs of the scheme in future years;
- (d) repeals spent provisions of, and makes other amendments in the nature of statute law revision to, the principal Regulation; and
- (e) requires another review of the principal Regulation as soon as possible after 10 years from the commencement of this Regulation.

[Protection of the Environment Operations \(Clean Air\) Amendment \(Open Burning in Lake Macquarie City\) Regulation 2016](#) - published 9 December 2016, amended the [Protection of the Environment Operations](#)

[\(Clean Air\) Regulation 2010](#) to allow the burning of domestic waste on residential premises in the City of Lake Macquarie in certain circumstances, and to enable Lake Macquarie City Council to approve the burning of dead and dry vegetation in certain circumstances. Currently, a person must not burn anything in the open or in an incinerator in the City of Lake Macquarie, unless in accordance with an Environment Protection Authority approval.

Civil Procedure Amendments

[Uniform Civil Procedure \(Amendment No 82\) Rule 2016](#) - published 9 December 2016, updated the expert witness code of conduct set out in Sch 7 to the Rules so that it conforms with harmonised rules approved by the Council of Chief Justices.

[Uniform Civil Procedure \(Amendment No 83\) Rule 2016](#) - published 9 December 2016, gave effect to harmonised rules approved by the Council of Chief Justices with respect to service of an originating process and other documents outside of Australia.

Mining Legislation Amendments

The [Mining and Petroleum Legislation Amendment \(Land Access Arbitration\) Act 2015 No 41](#) (**Land Access Arbitration Act**) proclamation - published 1 December 2016, appointed 1 December 2016 as the day on which the uncommenced provisions of the Land Access Arbitration Act commenced.

[Mining Legislation Amendment \(Arbitration\) Regulation 2016](#) (**the Mining Regulation 2016**) - published 1 December 2016, made the following amendments, which are consequential on the enactment of the [Mining and Petroleum Legislation Amendment \(Land Access Arbitration\) Act 2015](#).

(a) amendments to the Mining Regulation 2016:

- (i) to make it clear that nothing in the [Mining Act 1992](#) or the [Mining Regulation 2016](#) requires the boundaries of an area to which an exploration licence is intended to apply to match or mirror the boundaries of 1 or more units;
- (ii) to prescribe the procedure to be followed by the Minister before appointing a person as a member of the Arbitration Panel;
- (iii) to specify the qualifications and experience that make a person eligible for appointment to the Arbitration Panel;
- (iv) to specify the maximum term of office of members of the Arbitration Panel;
- (v) to provide for the making and investigation of complaints against arbitrators who are members of the Arbitration Panel; and
- (vi) to provide for the payment of costs concerned in negotiating access arrangements and the provision of evidence of the incurring of those costs.

(b) an amendment to a transitional provision inserted into the [Mining Act 1992](#), including for law revision purposes.

[Petroleum \(Onshore\) Legislation Amendment \(Arbitration and Compensation\) Regulation 2016](#) - published 1 December 2016, made the following amendments, which are consequential on the enactment of the **Land Access Arbitration Act**:

(a) amendments to the [Petroleum \(Onshore\) Regulation](#) 2016:

- (i) to make it clear that nothing in the [Petroleum \(Onshore\) Act 1991](#) or the [Petroleum \(Onshore\) Regulation 2016](#) requires the boundaries of an area comprised in a petroleum title to match or mirror the boundaries of 1 or more blocks;

- (ii) to prescribe an access code containing provisions relating to access to land by the holder of a prospecting title and the carrying out of activities on that land by the holder and to designate which provisions of that code are mandatory;
 - (iii) to provide for the making and investigation of complaints against arbitrators who are members of the Arbitration Panel;
 - (iv) to provide for the payment of costs concerned in negotiating access arrangements and the provision of evidence of the incurring of those costs; and
 - (v) to specify the matters for consideration in determining the compensation to be paid to a landholder.
- (b) an amendment to a transitional provision inserted into the [Petroleum \(Onshore\) Act 1991](#), including for law revision purposes.

On Exhibition/Consultation

The Department of Planning and Environment is seeking submissions until 31 March 2017 on possible legislative changes to the New South Wales planning legislation. The proposed legislative changes and supporting [information on these proposed changes](#) are available on the linked website.

Public submissions are open until 15 March 2017 to comment on proposed changes in the [Environment and Planning Amendment \(ePlanning\) Regulation 2017](#).

The NSW Department of Primary Industries is exhibiting a [Status and Issues Paper for eight water resource plans](#). Submissions close 31 March 2017.

Judgments

United Kingdom

The Queen (on the application of Peter Wright) v Forest of Dean District Council [\[2016\] EWHC 1349 \(Admin\)](#); [2016] JPL 1235 (Dove J)

Facts: on 30 September 2015, Forest of Dean District Council (**the defendant**) granted planning permission for Resilient Energy Severndale Ltd to change the use of agricultural land to wind turbine and install a wind turbine, which included the installation of a grid connection and the carrying out of ancillary works. In considering whether to grant planning permission, a planning committee of the defendant considered the commitment to donate 4% of the turnover of the wind turbine to the local community, for local projects, activities and initiatives (**the community donation**), as a benefit of the proposed development.

Issues:

- (1) whether the community donation was not a material consideration that the defendant could lawfully have considered because it did not serve a financial purpose, was not related to land use and had no connection with the proposed development; and
- (2) whether the Court should exercise its statutory discretion to refuse relief on the basis that the decision to grant planning permission would not have been substantially different if no legal error had been made.

Held: application granted; planning permission quashed:

- (1) the defendant was not entitled to take into account, as a material consideration in its decision to grant planning permission, the offer of the community donation made by the proponent and, therefore, the decision was unlawful: at [59];
- (2) to be a material consideration, the community donation was required to, citing *Newbury District Council v Environment Secretary* [\[1981\] AC 579](#), be for a planning purpose and be fairly and reasonably related to the development proposed: at [26] and [52];
- (3) the community donation did not serve a planning purpose or fairly and reasonably relate to the development proposed: at [55];
- (4) rather, the community donation was an untargeted contribution of off-site community benefits which was not designed to address a planning purpose: at [55];
- (5) there was no real connection between the development of a wind turbine and the gift of monies to be used for any purpose which appointed members of the community considered that their community would derive benefit: at [56];
- (6) the Court declined to exercise its discretion to refuse relief for the above legal error: at [59]; and
- (7) the evidence demonstrated that the decision was a balanced decision that could have been determined either way and, therefore, the Court could not be satisfied that, in the absence of legal error, the decision would not have been substantially different: at [59].

High Court of Australia

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [\[2016\] HCA 50](#) (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ)

(related decisions: ***New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*** [2015] NSWCA 349 (Beazley P, Macfarlan JA, and Leeming JA); ***New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)*** [2014] NSWLEC 188 (Pain J))

Facts: the appeal concerned a claim by the New South Wales Aboriginal Land Council (**the NSWALC**), under the ***Aboriginal Land Rights Act 1983 (NSW)*** (**the ALR Act**) over two adjoining parcels of land in Berrima (“the claimed land”) which had been the site of a gaol and correctional centre. Different parts of the claimed land had been the subject of dedications under statutes which preceded the ***Crown Lands Act 1989 (NSW)*** (**the CL Act**). At the date of the claim consideration was being given to the appropriate future ownership and/or management arrangements for the property. The claim was made in February 2012 but refused by the joint Crown Lands Ministers on the basis that the claimed land was “lawfully used and occupied” within the meaning of s36(1)(b) of the ALR Act. At the date of claim, the State of New South Wales was the registered proprietor of the claimed land under Torrens registration: at [1]-[4].

Issues:

- (1) whether the land continued to be occupied as at the date of the claim; and
- (2) if it was so occupied, was that occupation with statutory authority and thus lawful.

Held: dismissing the appeal:

- (1) the court accepted that s36(1) of the ALR Act identifies as “claimable Crown lands” lands which are no longer needed, and so surplus in that sense. This was inferred from the contrary position which is stated in s36(1)(b1) and (c) with respect to lands which continue to be needed or are likely to be needed: at [27];
- (2) section 36(1)(b) was found not to contain the assumption that land is surplus to needs from the moment that its dedicated purpose is no longer pursued by use for that purpose. Instead, s 36(1)(b) poses a question of fact about the land which must be answered before the land can be said to be claimable: whether it is lawfully used or occupied: at [27];
- (3) at the date of the claim, the claimed land and the buildings on it were not deserted. They had been the subject of continuous physical possession. Even if that possession was reduced to a minimum, it was more than notional. The acts of repair and maintenance of the claimed land and buildings, including the tending to the gardens, were acts associated with continued occupation, even if the buildings were no longer being actively put to their former use. The act of permitting the public to enter and view parts of the claimed land was an act consistent with the exercise of control over the claimed land. Viewing these factors as a whole, the claimed land was held to be occupied at the date of the claim: at [28];
- (4) on the acquisition of the fee simple estate in the claimed land under s 13D(1) of the ***Real Property Act 1900 (NSW)***, the State became the owner of the estate in fee simple over the claimed land. As the owner of that estate, the State enjoyed the right to occupy the claimed land, so that the State’s occupation of the land is lawful, subject to any statutory prohibition upon occupation: at [61]; and
- (5) while the dedications may not permit the claimed land to be actively used for purposes inconsistent with the dedications, occupation for the purpose of preserving the value of the land as an asset of the State of New South Wales so that it may then be used by the State to best advantage having regard to any dedications existing at that time is not occupation inconsistent with the dedications: at [61].

Western Australian Planning Commission v Southregal Pty Ltd; Western Australian Planning Commission v Leith [2017] HCA 7 (Kiefel, Bell, Gageler, Keane and Nettle JJ)

(related decisions: ***Western Australian Planning Commission v Southregal Pty Ltd*** [2016] WASCA 53 (Martin CJ, Newnes and Murphy JJA); ***Leith v Western Australian Planning Commission*** [2014] WASCA 499 (Beech J))

Facts: the Peel Region Scheme is a planning scheme made pursuant to the provisions of the ***Planning and Development Act 2005 (WA)*** (**the PD Act**). It came into effect in March 2003 and relevantly reserved the land in question in these appeals for a public purpose, namely, for regional open space.

At that time, the land was owned by persons other than the respondents. In October 2003, Southregal Pty Ltd (**Southregal**) and Mr Wee, the respondents in the first appeal, purchased land affected by the reservation and, in 2008, applied to develop it.

In June 2003, Mr Leith, the respondent in the second appeal, purchased land affected by the reservation and, in 2009, applied to develop it. Both applications were refused on account of the reservation.

The respondents each claimed compensation pursuant to the provisions of Pt 11 of the PD Act. The claims were refused by the appellant, the Western Australian Planning Commission (**the WAPC**), on the basis that compensation under the PD Act was only available to the person who owned the land at the time of its reservation.

The relevant provisions of the PD Act included ss 173, 177(1), 177(2) and 177(3), with particular focus on the meaning of ss 177(2)(a) and 177(2)(b).

Issue:

- (1) whether a person can be entitled to compensation pursuant to the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid of the PD Act.

Held: upholding each appeal and determining that none of the claimants were entitled to compensation:

Per Kieffel and Bell JJ:

- (1) a construction of s 177(2)(b) of the PD Act which does not read it as referable to a subsequent purchaser who makes a development application has the advantage of consistency, which, after all, is the primary object of statutory construction: at [52];
- (2) whilst it must be accepted that words chosen by the legislature should be given meaning and endeavours should be made to avoid them being seen as redundant, they should not be given a strained meaning, one at odds with the scheme of the statute. Moreover, it has been recognised more than once that Parliament is sometimes guilty of "surplusage" or even "tautology". The possibility that Parliament may not have appreciated that the reference in s 177(2)(b) was not necessary, and was liable to confuse, is not a reason for giving it a literal interpretation: at [55];

Per Gageler and Nettle JJ agreeing:

- (3) according to orthodox statutory interpretation principles, the difference between the expressions "owner of the land at the date of reservation" and "owner of the land at the date of application" prima facie suggested that each expression had a different meaning. But, given that the right to compensation created by s 36(1) was the right to compensation under s 11(1) of the [Town Planning and Development Act 1928 \(WA\)](#) (**the TPD Act**) (as modified by s 36(1) and following provisions), which inured solely for the benefit of the owner of land at the time the relevant planning scheme was made, it logically accorded with the scheme of the legislation and was not repugnant to the natural and ordinary meaning of the text to construe the difference between the two expressions as denoting no more than the two different circumstances in which compensation was payable to the person who was the owner of the land at the time it was reserved for a public purpose under a planning scheme: at [91];

Per Keane J dissenting:

- (4) it was wrong to approach the proper interpretation of Pt 11 of the PD Act as if it were solely concerned to provide compensation measurable by reference to the first sale by an owner of affected land. While the sale price may be less than it otherwise would have been because the effect of the reservation is factored in, in some general way, to the price of the first sale after the reservation comes into effect, s 177(2)(b) and s 179(2)(b) and (c) expressly contemplate a diminution in value arising out of the reservation and the subsequent refusal of an application for development approval or grant of an approval on unacceptable terms: at [164]; and
- (5) the reservation of land for public purposes does not operate to resume land or effect an absolute prohibition on development. Whether a reservation of land for public purposes actually diminishes the value of land in a sufficiently material way, so as to entitle the owner of the land to payment of compensation, may not be known until an application for a development approval is refused. And that diminution in value may bear little relationship to the price paid by the owner: also at [164].

Note: Although the matters requiring to be determined by the High Court were confined to specific issues of construction of the relevant provisions of the PD Act and the analysis relating to this is not reproduced, the following matters and observations are of general interest.

NSW Court of Appeal

Bechara trading as Bechara and Company v Bates [\[2016\] NSWCA 294](#) (Beazley P, Meagher and Payne JJA)

(related decisions: ***Bechara v Bates (No 3)*** [\[2015\] NSWSC 1588](#) (Adamson J))

Facts: on 27 May 2016 the Court dismissed Ms Bechara's amended summons seeking leave to appeal from a judgment and orders of Adamson J made on 29 October 2015. The orders of the Court were that the summons be dismissed with costs. Ms Bechara did not appear at the hearing on 27 May 2016 and was not present in Court at the time the orders were made. The respondent, Mr Bates, was present and appeared for himself as counsel. The respondent, Mr Bates, made an oral application for a lump-sum costs order. The respondent's application was for a lump-sum costs order to be specified in the gross sum comprising solicitors' costs and disbursements (other than counsel's fees); and for counsel's fees for professional work performed by himself.

Issues:

- (1) whether the definition of "costs" contained in s 3 of the [Civil Procedure Act 2005 \(NSW\)](#) (the CP Act) does away with the *Chorley* exception (see *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872 - in *Chorley*, the Court of Appeal confirmed that a solicitor appearing for himself was, if successful, entitled to recover professional costs for his activities as part of a costs order); and
- (2) whether the *Chorley* exception applies to a self-represented barrister.

Held: costs order made for self-represented barrister:

- (1) it is not appropriate to finally determine the important questions of construction raised in this case: at [66];
- (2) there is no authority of the High Court or an intermediate Court of Appeal as to whether the *Chorley* exception applies to a self-represented barrister. Unlike the cases concerning solicitors acting for themselves, this case concerns a barrister acting for himself as the client with an independent firm of solicitors briefing him: at [30];
- (3) in the absence of any submissions put by Ms Bechara, she may be taken to have conceded the point: at [67]; and
- (4) having regard to the broad discretion available in making a lump-sum costs order the Court allows an amount of \$7,000 on behalf of barristers costs as a lump sum under s 98(4)(c) of the CP Act: at [69].

Engelbrecht v Director of Public Prosecutions (NSW) [\[2016\] NSWCA 290](#) (McColl JA, Macfarlan JA agreeing in a separate judgment and Leeming JA dissenting)

(related decisions: original decision not reported.)

Facts: the applicant sought judicial review of a decision of the District Court which dismissed his appeal against a sentence imposed by a Magistrate in the Local Court.

During the course of the hearing in the District Court, the primary judge gave a series of rulings that had the effect of restricting the range of material to which he would have regard on the sentencing appeal. He also declined to grant the applicant an adjournment to permit reconsideration as to how the applicant's case might properly be advanced in light of those rulings.

The applicant contended that the primary judge fell into jurisdictional error because his Honour misapprehended the nature of the power he was exercising in determining the appeal pursuant to s 17 of the [Crimes \(Appeal and Review\) Act 2001 \(NSW\)](#) (the CAR Act).

Issues:

- (1) whether the primary judge committed jurisdictional error in misapprehending the nature of the power exercised pursuant to s 17 of the CAR Act;
- (2) whether the evidence given at the hearing to determine guilt was necessarily part of the evidence at the sentence hearing; and
- (3) whether the sentence appeal to the District Court was in the nature of hearing *de novo*.

Held: upholding the appeal and making Orders in the nature of certiorari that (1) removing the record of the proceedings in the District Court in its criminal jurisdiction into the Court of Appeal and (2) quashing the determination of the District Court dismissing the appeal against the sentencing decision of the Local Court; directing that the proceedings be returned to the District Court in its criminal jurisdiction to be heard and determined according to law; and ordering the Crown to pay the applicant's costs of the application for judicial review:

Per McColl JA:

- (1) there is no rigid taxonomy of jurisdictional error. However, generally speaking, an inferior court commits jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist".; at [45];
- (2) jurisdictional error will also be found where a judicial officer misconstrues the relevant statute and, accordingly, "misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case.": at [46];
- (3) where there is the appearance of an exercise of jurisdiction, but one which does not conform to the requirements of the law, such a failure will generally involve jurisdictional error as the process of decision-making has miscarried: at [47];
- (4) where there is a complaint of jurisdictional error, the court may have regard to "any admissible evidence relevant for that purpose": at [48];
- (5) findings of fact made by a sentencing judge must be consistent with the verdict of guilt and, in the case of facts taken into account in a way that is adverse to the interests of the accused, must be arrived at beyond reasonable doubt: at [23];
- (6) the effect of this constraint in a given case may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender: at [53];
- (7) it is difficult, in the light of that task, to determine how a judge determining a severity appeal could assess the applicant's culpability without having regard to the evidence adduced in relation to conviction in order to resolve that issue: at [54];
- (8) broadly speaking, there is a recognised distinction between first, appeals in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given, secondly, appeals *de novo* – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error (appeal *de novo* and, thirdly, appeals by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error and, in some cases, has power to receive additional evidence (error based appeal). In the latter case, although the appeal is described as being "by way of rehearing", it does not "call for a fresh hearing or hearing *de novo* [and] the court does not hear the witnesses again.": at [60]
- (9) one of the indicia of a rehearing function is the conferral of a discretion on an appellate body to admit further evidence. Such a power is of a remedial nature conferred "to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures.": at [61];
- (10) conversely, the omission of a leave requirement for the admission of "fresh evidence" indicates that the s 17 appeal is a hearing *de novo* requiring the sentence proceedings consequent upon the

conviction to be heard afresh. On such an appeal, the Court exercises original jurisdiction and the sentence is that of the District Court judge and must represent his or her “view of the matter”, not whether the Magistrate’s view was appropriate: at [92];

- (11) the conclusion that a severity appeal requires a hearing de novo is not gainsaid by the fact that it proceeds “by way of a rehearing of the evidence given in the original Local Court proceedings”, albeit with a right to adduce fresh evidence: at [95];
- (12) in determining the severity appeal, the primary judge was required to have regard to the evidence given in the original Local Court proceedings, and to such other “fresh evidence” as was adduced: at [98];
- (13) it was an error on the primary judge’s part for him to reject the submission that s 17 of the CAR Act meant that such part of the transcript as was relevant evidence for the purpose of the severity appeal could be adduced and that the applicant should be given an adjournment to facilitate the identification and provision of that evidence by way of the Local Court transcript: at [101];
- (14) his Honour acted on an incorrect principle as to the manner in which the severity appeal was to be determined such as to overcome the presumption in favour of the correctness of the exercise of his Honour’s discretionary refusal to grant the adjournment sought for the applicant. Rather, refusing the adjournment occasioned a serious injustice as it denied the applicant the opportunity to bring to the severity appeal the matters concerning his culpability he sought to contend ought be the basis of his sentence so that the primary judge could apply the principle of proportionality in the course of determining himself what the sentence should be: at [102]; and
- (15) having misapprehended the nature of his power pursuant to s 17, his Honour committed a jurisdictional error such that the hearing of the severity appeal was not a hearing according to law: at [104].

Per Macfarlan JA agreeing with the orders proposed by McColl JA:

- (16) the applicant had a right to refer the District Court judge to any evidence given at the conviction hearing that was relevant to his sentencing. The application was rejected upon the basis of the Court’s misunderstanding that the evidence given at the conviction hearing was not evidence to which the applicant was entitled to refer because it was not evidence specifically tendered at the sentence hearing. This was a misunderstanding by the District Court judge of his powers and duties in connection with the disposition of the appeal and for that reason constituted jurisdictional error rendering his decision reviewable by the Court of Appeal: at [118]; and
- (17) the applicant is able to challenge, in the Court of Appeal, the erroneous basis upon which his adjournment application was refused: at [122].

Per Leeming JA dissenting:

- (18) although there was some force in the submission that “the evidence given in the original Local Court proceedings” in s 17 was a reference to the evidence given leading to both conviction and sentence, that was not the proper construction of s 17: at [138];
- (19) the “evidence given in the original Local Court proceedings” for the purposes of a conviction appeal in s 18 was only the evidence which involved the making of the conviction: at [142];
- (20) the words “evidence given in the original Local Court proceedings” (common to ss 17 and 18) were to be read with the defined term “original Local Court proceedings”. There was no reason to displace the ordinary approach whereby the Court is to “read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome”: at [144];
- (21) taking their ordinary grammatical meaning, the two statutory concepts of evidence in proceedings which involved the making of a conviction and evidence in proceedings which involved the imposition of a sentence require a distinction to be drawn between the evidence leading to conviction, and the evidence leading to sentence. The latter does not include the former: at [145]; and
- (22) a severity appeal under s 17 is based on the evidence before the sentencing Magistrate, plus such other “fresh evidence” as may be relevant. The reasons of the primary judge do not disclose error, still less jurisdictional error. The primary judge made no error in rejecting a submission founded on

the text of s 17. To the extent that the offender sought to tender evidence from the eight day trial on his severity appeal, he was permitted to do so: at [152].

Kovacevic v Queanbeyan City Council [\[2016\] NSWCA 346](#) (Beazley ACJ, Leeming and Payne JJA)
(related decisions: ***Queanbeyan City Council v Kovacevic*** [\[2015\] NSWLEC 152](#) (Craig J))

Facts: the applicant conducted from the premises in question driver training and licence assessment tests for persons seeking to drive heavy vehicles. Heavy vehicles, including prime movers, trucks and trailers, would frequently park on or immediately adjacent to the grounds of the premises. Under the Queanbeyan Local Environment Plan 1998 (**the QLEP**) use of such land for the purpose of a “transport depot” required the grant of development consent. No such consent had been obtained for the premises.

On 6 August 2009, Queanbeyan City Council (the Council) ordered, pursuant to s 121B(1) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) that the applicant cease use of the premises as a transport depot as defined in the QLEP.

On 2 November 2011, the applicant was issued with a court attendance notice (**CAN**), alleging an offence contrary to s 125(1) of the EP&A Act. Under the heading “Details of Prosecutor”, the CAN contained the following information:

“Prosecutor: PETER REYNDERS

Department/Organisation: Queanbeyan City Council - 100936

...

Telephone: State Debt Recovery Office 1300 138 118”

Mr Reynders was, at the date of issue of the CAN, an employee of the Council. It was an agreed fact on the appeal that Mr Reynders retired on 14 May 2012 prior to the hearing of the charge in the Local Court.

On 11 September 2012, the Local Court dismissed the charge against the applicant. The Council appealed against the dismissal of the charge.

On 25 September 2015, Craig J allowed the Council’s appeal with costs, set aside the dismissal of the prosecution against the applicant, and remitted the matter to the Local Court.

On 23 May 2016, the applicant sought, by way of judicial review, relief setting aside the decision and orders of Craig J.

Issues:

- (1) whether the Council is the “prosecutor” for the purposes of bringing an appeal; and
- (2) whether the parking of vehicles used in connection with a business, industry or shop must involve the transport of something.

Held (the Court) dismissing the appeal:

- (1) section 3(1) of the [Crimes \(Appeal and Review\) Act 2001 \(NSW\)](#) (**the CAR Act**) defines “prosecutor” as follows:

“**prosecutor**, in relation to proceedings from which an appeal or application for leave to appeal is made, means the person responsible for the conduct of the prosecution in those proceedings”: at [19];

- (2) the concern in the CAR Act is only with the person responsible for the conduct of the proceedings. Further, the plain meaning of the phrase indicates that it is the person or entity that has the overall charge or control of the prosecution that is the prosecutor. The definitional phrase “*person responsible for the conduct of the prosecution*” involves a continuum of action. It is not only concerned with the institution of proceedings, but with their conduct from beginning to end: at [57];
- (3) it would be an unsatisfactory, if not absurd and unintended, result of the legislation if an entity such as a Council was deprived of the right to appeal from an order made by the Local Court because the person instituting the proceeding was not available to bring an appeal: at [56];

- (4) the construction given to the definitional clause “transport depot” by the primary judge was correct for the reasons he gave. When regard is had to the text of the provision and, in particular, to its grammatical construction, including the placement of the commas and the use of the disjunctive “or”, the text of the clause plainly means:

“A transport depot is a building or place used for the parking or storage of vehicles used in connection with a passenger transport undertaking; or in connection with an industry or in connection with a shop and includes a bus depot or a road transport terminal”: at [85]; and

- (5) as the primary judge found, this construction is consistent with the objectives of the LEP for both the business and industrial zones. The Council would be concerned with the orderly use of any business activity carried on within those zones, including in relation to the use and parking of vehicles: at [86].

Museth v Windsor Country Golf Club Ltd [\[2016\] NSWCA 327](#) (Gleeson JA, Barrett AJA and McDougall J)

(related decisions: original decision not reported)

Facts: Mr Museth (**the appellant**) sued the respondent (**the Club**) in nuisance. He claimed that water flowed from the Club’s land onto his land and penetrated the subsurface clay soil. That, Mr Museth claimed, caused damage to the structure to his house. The primary judge found the nuisance proved (although he found that it had been abated in August 2015, when remedial measures taken by the Club stopped the flow of water from its land to Mr Museth’s land). The primary judge also rejected engineering evidence sought to be relied upon by Mr Museth.

Editor’s note: this decision is reported solely for the relevance of the consideration by the Court of Appeal of issues concerning admissibility of expert evidence. It is not necessary to traverse other aspects of matters dealt with at first instance or on appeal.

Issues:

- (1) whether the expert evidence satisfied the requirement for admissibility under s 79 of the [Evidence Act 1995 \(NSW\)](#) (**the Evidence Act**) as expert evidence where there was an absence of demonstrated reasoning process; and
- (2) whether it was otherwise open to the primary judge to receive that evidence.

Held (McDougall J, Gleeson JA and Barrett AJA agreeing):

- (1) if the evidence does not demonstrate that an opinion expressed by a witness is based on the specialised knowledge of that witness, which in turn is based on training, study or experience, then the evidence is not admissible: at [40];
- (2) purported expert opinion evidence should not be admitted unless the requirements of s 79(1) are proved or conceded: at [42];
- (3) it is not consistent with r 31.28 to permit expert evidence to be given, particularly on a vital topic, unless the requirements of the rule have been met (or the opposing party consents): at [43]; and
- (4) the absence of any demonstrated reasoning process in the engineer’s reports means that they were inadmissible, because they could not be seen to come within s 79(1) of the Evidence Act: at [57].

Supreme Court of NSW

Application of Willoughby City Council (as manager of the Talus Reserve Trust) [\[2016\] NSWSC 1717](#) (Brereton J)

Facts: the Talus Reserve is a “reserve” within the meaning of [Crown Lands Act 1989 \(NSW\)](#) (**the CL Act**). The registered proprietor is the State of New South Wales. The Talus Reserve comprises about three and a half acres of land at Naremburn in the local government area of Willoughby. Since 1978, the Talus Reserve – on which are situated eight tennis courts, a clubhouse and a car park – has been leased to private interests which organise and conduct sporting (tennis) activities. The most recent

lease, dated 6 December 2000, was between the Talus Trust as lessor and Northern Suburbs Tennis Club Limited (**NSTC**) as lessee (**the 2000 Lease**). That lease, to which the Minister administering the Crown Lands Act (**the Minister**) consented, expires in April 2018. On 18 July 2001, NSTC - with the consent of the Minister - assigned its interest as lessee to Northern Suburbs Tennis Association Inc (**NSTA**), an incorporated association, the objects of which include organising and promoting tennis within its boundaries on the North Shore of Sydney.

By a series of “management agreements” made in 1992, 2005 and in October 2008, NSTC and subsequently NSTA have authorised and permitted Love ‘n Deuce Pty Limited (**LnD**) to occupy the Talus Reserve – excluding some parts of the clubhouse – whence LnD operates for profit a commercial business which includes conducting tennis programmes, coaching clinics, competitions, school holiday tennis camps, and “Humpty Squad” multisport activities for children. LnD also uses the premises on the Talus Reserve as its headquarters, from which it operates tennis centres and schools elsewhere. None of these management agreements had the prior written consent of the Council, the Talus Trust, or the Minister.

Issues:

- (1) whether demise of a reserve to a private club is consistent with public recreation;
- (2) was the opinion that such demise is not materially harmful to use for the reserved purpose reasonably open;
- (3) whether a grant which dominates or excludes the reserved purpose is a secondary interest;
- (4) whether the lessee of a Crown reserve can grant a sublease; and
- (5) whether the case is an appropriate one for judicial advice.

Held:

- (1) the demise of the whole of the Reserve to a private association, whose members have priority rights to use of the Reserve, is plainly not a use for public recreation. At least, but for the multiple use amendments of 2013, the lease to NSTC/NSTA would be unlawful, as not being for or ancillary to the reserved purpose of public recreation: at [104];
- (2) the multiple use amendments do not validate every existing secondary interest, but only those which would have been validly granted had s 34AA of the been in force at the time of the grant. While the Talus Trust must be deemed to have in fact held the opinion that use or occupation of the Talus Reserve pursuant to the 2000 Lease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose of public recreation, that was an opinion that was not, having regard to the relevant considerations referred to in s 34AA(3), reasonably open, and accordingly the 2000 Lease would not have been validly granted, even if s 34AA had then been in force: at [105];
- (3) the lessee of a Crown reserve can, subject to the terms of the lease, grant a sublease, provided that use of the reserve pursuant to the sublease will be for the reserved purpose, or (in the reasonable opinion of the reserve trust) in the public interest and not likely materially to harm its use for the reserved purpose: at [106]; and
- (4) an application for judicial advice was not an appropriate vehicle for determination of the issues raised: at [108].

Bellbird Ridge Pty Ltd as trustee for Bellbird Ridge Unit Trust v Chief Commissioner of State Revenue [\[2016\] NSWSC 1637](#) (White J)

Facts: Bellbird Ridge sought review of decisions of the Chief Commissioner of State Revenue to issue assessments of land tax. The assessment notices were dated 9 April 2014 and 28 April 2015 and related to the land tax years 2011 to 2015. Bellbird Ridge sought orders that the assessments be revoked.

The land in question comprises 80.381 hectares at Bellbird near Cessnock. Prior to 24 January 2011 the land was zoned Rural. From 24 January 2011 the land was rezoned as partly “R2 Low Density Residential”, partly “RE1 Public Recreation” and partly “B1 Neighbourhood Centre”.

The land was acquired by Bellbird Ridge on 7 May 2007. Bellbird Ridge is a wholly owned subsidiary of Johnson Property Investments Pty Ltd, a company which forms part of the Johnson Property Group. The Johnson Property Group is engaged in the business of property development.

Bellbird Ridge contended that the land is exempt from land tax pursuant to s10AA of the [Land Tax Management Act 1956 \(NSW\)](#).

Issues:

- (1) whether use of land for the grazing of cattle is the dominant use of the land; and
- (2) whether the primary production use of land has a significant and substantial commercial purpose or character.

Held:

- (1) in each of the land tax years in question, the use of the land for cattle grazing was the dominant use of the land. It followed that the assessment for the 2011 land tax year should be revoked: at [10]; and
- (2) in respect of the later years, the primary production use of the land did not have a substantial commercial purpose or character within the meaning of s 10AA(2). It was not necessary to decide whether it has been engaged in for the purpose of profit on a continuous or repetitive basis. Accordingly, the assessments for the 2012-2015 land tax years were confirmed: at [10].

Darcy v Duckett [\[2016\] NSWSC 1756](#) (Campbell J)

Facts: these proceedings concern a dispute between the relatives of a deceased Aboriginal person as to who should have the right to bury him. The plaintiff was the sister of the deceased and the first defendant was his de facto wife. The conflict was whether it was appropriate to bury him in his traditional country (where he was born) or the country where he died.

Issues:

- (1) whether the plaintiff was entitled to bury the deceased person.

Held: the defendant, Ms Duckett, is entitled to bury the deceased person:

- (1) the proper approach requires a balancing of common law principles and practical considerations, as well as attention to any cultural, spiritual and religious factors that are of importance. However, the common law rule favoured Ms Duckett's claim over Ms Darcy's claim: at [27];
- (2) common law principles gave, as the surviving de facto spouse, a strong, but not determinate, claim. The claim of a de facto spouse of 16 years' standing, who has four children by the deceased, "is a strong one on any view of the practices and attitudes that prevail in our society". Burying Mr Darcy in his adopted country is an outcome which is acceptable under the view of Aboriginal law and custom: at [33]; and
- (3) consistently with common law principle, Ms Duckett should recognise and respect the views held by Ms Darcy and other members of Mr Darcy's birth family. Moreover, it would be desirable if any essential requirements of the Weilwan funeral ceremony (that of Mr Darcy's birth country) could be taken into account and, if possible, adopted for the burial of Mr Darcy: at [34].

Kirkman v Minister Administering the Crown Lands Act 1989 [\[2016\] NSWSC 1876](#) (Stevenson J)

Facts: the plaintiff sought judicial review of a decision (the permit decision) made on 13 August 2014 by the Minister Administering the [Crown Lands Act 1989 \(NSW\)](#) (the CL Act) (the Minister), not to sell to her a portion of an unmade Crown road adjoining her property and in respect of which she was the holder of an enclosure permit pursuant to s 61 of the.

She also challenged a corresponding decision made by the Minister on 14 November 2014 under s 34 of the [Roads Act 1993 \(NSW\)](#) to sell that portion of the Crown road to the second defendant, her neighbour. It was common ground that resolution of the first question would resolve the second.

She claimed that the Minister, by his delegate, took into account an irrelevant consideration when making his decision (namely the purported permit decision) and did not afford her procedural fairness.

Issues:

- (1) whether the Minister's delegate took into account an irrelevant consideration; and
- (2) whether the plaintiff was also denied procedural fairness.

Held:

- (1) the Minister's delegate took into account an irrelevant consideration, namely a state of affairs that assumed the validity of the Permit Decision, when making her decision: at [36];
- (2) it was common ground that, if that was the correct conclusion, the decision was attended by jurisdictional error and should be set aside: at [37];
- (3) having come to this conclusion, it was not necessary to address whether she was denied procedural fairness but his Honour did so: at [38]; and
- (4) assuming that what was said in the letter should be seen as a statement of the Minister's policy or practice, it was followed in this case. The Minister did decide to sell the Disputed Portion to an adjoining landholder. Insofar as preference was not given to the Plaintiff (who was only one of the two adjoining landholders), the Department's position, and thus the Minister's, was made clear by letter of 4 June 2014 and there was no denial of procedural fairness: at [40] and [41].

Wakim v Criniti [2016] NSWSC 1723 (McCallum J)

Facts: These defamation proceedings were commenced by statement of claim filed 12 October 2016. The plaintiff was unable to serve the statement of claim on the defendant and sought an order for substituted service.

Issues:

- (1) whether substitute service may be made by social media.

Held: making orders for substituted service by e-mail, Facebook, Linked-In and Instagram.

- (1) the statement of claim cannot practicably be served on the defendant in person: at [1] and [5];
- (2) the methods of service proposed in the plaintiff's notice of motion (using social media to effect service) were likely to bring the statement of claim to the notice of the defendant: at [5]; and
- (3) orders for substituted service by social media were appropriate to be made: at [5] and [6].

Land and Environment Court of NSW

- Judicial Review

Anature Incorporated v Centennial Springvale Pty Ltd [2016] NSWLEC 121 (Pepper J)

Facts: on 21 September 2015, the Planning Assessment Commission (**PAC**), as a delegate of the Minister for Planning (**the Minister**), granted development consent to Centennial Springvale Pty Ltd (**Centennial**) for the Springvale Mine Extension Project (**the project**) subject to conditions. In a cover letter to the Minister enclosing the consent (**the cover letter**), the PAC noted that it had "carefully weighed the key areas of concern, including mine water discharge impacts and subsidence-related swamp impacts, against the socio-economic benefits of the project" and was "satisfied that the project's benefits outweighed its potential impacts". This was reiterated in a document published by the PAC the following day ("the published document").

The [State Environmental Planning Policy \(Sydney Drinking Water Catchment\) 2011](#) (the **Catchment SEPP**) applied to the project because part of the project was within the Sydney Drinking Water Catchment area. Clause 10(1) of the Catchment SEPP required a decision-maker to reach a state of independent satisfaction as to whether the carrying out of a project would have a neutral or beneficial effect (**NorBE**) on water quality before consent could be granted.

The applicant, 4nature Incorporated (**4nature**), submitted that the PAC did not reach the requisite state of satisfaction that the project would have a NorBE on water quality. Because this satisfaction was a precondition to the exercise of the PAC's powers of approval, the consent was invalid.

Issues:

- (1) whether the cover letter and published document constituted a statement of reasons;
- (2) whether the PAC attained the requisite state of satisfaction that the carrying out of the project would have a NorBE on water quality as required by cl 10(1) of the Catchment SEPP; and
- (3) whether the PAC failed to take into account a mandatory relevant consideration, namely, whether the project would have a NorBE on water quality as required by cl 10(1) of the Catchment SEPP.

Held: dismissing the application:

- (1) the party seeking to establish jurisdictional error bears the onus of proof: at [154];
- (2) the cover letter and the published document, read jointly or separately, did not constitute an exhaustive statement of the PAC's reasons for granting the consent: at [145] and [148]. The PAC's reference in the letter to weighing the water impacts against the socio-economic benefits was a reference to s 79C of the [Environmental Planning and Assessment Act 1979](#), which the PAC was required to have considered. The PAC did not misunderstand, and therefore, did not fail to perform its statutory task in assessing the development application: at [147];
- (3) pursuant to cl 10(1) of the Catchment SEPP, the satisfaction required to found a valid exercise of power by the PAC to approve the project was a state of mind that had to be reasonably open to it and informed on a correct understanding of the law: at [180];
- (4) clause 10(1) of the Catchment SEPP did not specify a "base case" against which to assess the NorBE on water quality by the carrying out of development: at [181];
- (5) having regard to its text, context and purpose, cl 10(1) of the Catchment SEPP did not mandate that a particular assessment approach be adopted: at [185];
- (6) it was open to the PAC to identify the appropriate baseline and to form the view that it was satisfied that the carrying out of the development would have a NorBE on water quality compared to the existing water quality as at the date of its determination to grant consent: at [187];
- (7) having regard to the material before the PAC, it could not be concluded that the PAC had failed to reach the degree of satisfaction required by cl 10(1) of the Catchment SEPP: at [205]; and
- (8) having regard to the material before the PAC, it could not be inferred that the PAC had failed to properly consider the NorBE test contained in cl 10(1) of the Catchment SEPP: at [215].

Billinudgel Property Pty Ltd v Minister for Planning [\[2016\] NSWLEC 139](#) (Robson J)

Facts: the applicant, Billinudgel Property Pty Ltd (**Billinudgel**), was the owner of a cultural events site known as "North Byron Parklands". This property had consent to host music and other festivals throughout the year pursuant to a concept plan that was approved in April 2012 under Pt 3A of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (the **EP&A Act**). The concept plan restricted the amount of guests that could attend events, and the number of events per year, but increased these numbers on a yearly basis. In particular, Condition C1 allowed Billinudgel to apply for ongoing consent with greater numbers under Pt 4 of the EP&A Act for the period after 31 December 2017, and required that any application be accompanied by an environmental management and monitoring plan that accounted for a number of concerns.

In April 2016, Billinudgel applied to the respondent, the Minister for Planning (**the Minister**), requesting that it be able to modify the concept plan under s 75W of the EP&A Act to allow outdoor events with increased numbers of patrons, and remove the requirement to obtain further consent under Pt 4 of the

EP&A Act. The Minister formed the opinion that he did not have the power to grant this request, as it went beyond what constitutes a ‘modification’. As a result, Billinudgel commenced Class 4 proceedings seeking declaratory relief stating that the proposal is a ‘modification’ that could be made under s 75W of the EP&A Act.

Issues:

- (1) whether condition C1, the relevant condition, can be deleted from the concept plan as a result of the operation of s 75W of the EP&A Act; and
- (2) whether condition C1 can be deleted from the concept plan as a result of an implied or ancillary administrative power held by the Minister.

Held:

- (1) the meaning of ‘modification’ in s 75W of the EP&A Act has only been considered infrequently, and there is no established “test” to determine whether the deletion of Condition C1 should be considered a modification: at [53];
- (2) having regard to those cases which have considered the scope of s 75W of the EP&A Act, a two-step approach is appropriate, being:
 - (i) determine what was actually approved by the Minister: at [55]; and
 - (ii) consider whether an application seeks a modification of that approval: at [57];
- (3) with regard to the second step, the making of modification is constrained, to at least some degree, there is no clear dividing line between what is and is not a modification and whether something is a modification has generally been negatively defined as not being something else: at [58];
- (4) applying the first step, Condition C1 limited the lifespan of the concept approval, and required further assessment to be undertaken before it was to be extended: at [62];
- (5) applying the second step, Condition C1 represents a fundamental part of the concept plan, as it places an end date on the approval, rather than allowing the concept plan to continue subject to restrictions: at [67], [79];
- (6) whilst deleting C1 would allow the concept plan to operate in the manner that was originally applied for by Billinudgel and subject to environmental assessment at that stage, this is insufficient as the application and consent have merged, and the Minister determined that despite this assessment, a further assessment would be required: at [69], [80];
- (7) the replacement of a determination under 75P(1)(b) of the EP&A Act with a determination under s 75(1)(c) of the EP&A Act is beyond the power of the Minister to modify a concept plan: at [81];
- (8) with regard to whether an ancillary power existed, the test was outlined by Preston CJ of LEC in *Coffs Harbour City Council v Minister for Planning and Infrastructure* [2013] NSWCA 44, and is whether the power is “reasonably necessary to make the express grant of power effective”: at [89]; and
- (9) there is no power that it reasonably necessary to make the express powers under ss 75O(1) and 75W(4) of the EP&A Act effective, as this would remove various legislative safeguards and be contrary to the objects of the legislation: at [91].

***EMRR Pty Ltd v Murray Shire Council* [2016] NSWLEC 144** (Sheahan J)

Facts: the applicant proposed to extend the period of Council’s consent for a “function centre” from one year to three years, by deleting a condition of consent and substituting it with a condition that consent could be granted for the temporary use of the land for a function centre for a maximum of 52 days in each 12-month period for a period of three years, and that consent should lapse three years from the date of the first function conducted in accordance with the consent. The centre was proposed to augment an existing and approved tourist facility, known as “Tindarra Resort”, situated on land close to the Murray River, near Moama. The subject land was zoned E3 - Environmental Management.

The applicant and Council agreed upon the terms of a s 34 agreement under the [Land and Environment Court Act 1979](#) to resolve the appeal, including the three-year period. However, when informed of that

agreement, the second respondent, Mark Alan Pearce, a neighbour objector, successfully moved the Court to be joined in the proceedings so that the issue of “power” may be addressed. Pearce contended that the Council lacked power to grant the relevant development approval as the subject development was “prohibited” by the [Murray Local Environmental Plan 2011 \(the LEP\)](#), notably cl 7.4. Two issues were raised by Pearce, including (1) the conflict between clauses 7.4 (development on river front areas) and 2.8 (temporary use of land) of the LEP, and (2) the question of the proper characterisation of “temporary” uses, for the purposes of cl 2.8 of the LEP.

Issues:

- (1) whether the proposed development was prohibited development by operation of cl 7.4 of the LEP; and
- (2) whether the land use proposed in the application, as a continuous and regular use of land for the purpose of functions over a three year period, can be properly characterised as a “temporary use” for the purposes of cl 2.8 of the LEP.

Held: upholding the appeal:

- (1) the ordering of clauses does not indicate an intention to confer primacy on cl 7.4 – it follows the Standard Instrument: at [70];
- (2) clause 7.4 is more specific than cl 2.8, and operates with respect to land within a wide range of zones. It creates a “sub zone” which limits the development that may be carried out in that zone. It should be characterised as a zoning provision similar to the land use table, which is subject to cl 2.8: at [71];
- (3) clauses 2.8 and 7.4 are not inconsistent. A temporary use may occur on land where such a use may otherwise be prohibited in accordance with the terms of cl 7.4, provided it meets the requirements set out in cl 2.8(3) of the LEP: at [81];
- (4) the definition of “function centre” in the LEP anticipates the use of land for the purpose of events, rather than any preparatory or subsequent work associated with such events. It would be an impractical construction of the term “temporary use” if the land were able to be used only for the purpose of functions *and* associated preparatory work for a total of 52 days in a 12-month period: at [100]; and
- (5) no sound basis was put to the Court for the consent to be limited to only one year. The function centre is oriented toward events, such as weddings, which often need to be planned and booked well in advance of 12 months’ beforehand: at [101].

Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd [\[2016\] NSWLEC 166](#) (Robson J)

Facts: the matter concerned a challenge by the applicant against the decision of the Planning Assessment Commission (PAC) to approve modifications to the concept plan for the proposed Crown Casino Hotel Resort (Casino) at Barangaroo. The applicant contended that the PAC’s decision contained errors of law amounting to jurisdictional error. The modifications proposed by Lendlease (Millers Point Pty Ltd (the first respondent) allowed for Block Y, upon which the Casino was to be built, to be relocated from its approved position onto land previously allocated for public use. The first respondent also sought amendment of various State Environment Planning Policies (SEPPs) to rezone the land upon which the Casino was to be built. Crown Sydney (Property) Pty Ltd (the third respondent) sought approval to construct the Casino at the proposed new location as a State significant development (SSD Determination). Importantly, in 2013 the [Casino Control Act 1992 \(NSW\) \(the CC Act\)](#) was amended to allow a licence to be issued in relation to the Casino. The CC Act therefore contains a number of provisions relating to the Casino, including the boundaries and location of the Casino.

Issues:

- (1) whether the PAC misconstrued the CC Act by concluding that the location of Block Y was settled and considering that it had no power to direct relocation of the Casino;
- (2) whether the PAC failed to properly exercise its powers, duties and functions under s 75W of the EP&A Act;

- (3) whether the PAC took into account irrelevant considerations when exercising its power under s 75W of the EP&A Act;
- (4) whether the PAC made an error of law that rendered its approval of the modifications invalid;
- (5) whether the PAC breached cl 3B(2)(d) of Sch 6A and 89E of the EP&A Act by making the SSD Determination and as such committed an error of law; and
- (6) whether the PAC breached ss 79C(1)(c), 89E and 89H of the EP&A Act by taking into account irrelevant considerations, or alternatively failing to give proper consideration to the suitability of the proposed location of Block Y.

Held: proceedings dismissed:

- (1) the PAC did not misconstrue the CC Act, it was within reason for the PAC to conclude that the Licence for the Casino had to remain in the location as mapped in the site map: at [192]-[195];
- (2) the PAC does not have the power to direct the relocation of the Casino. The definition of the Casino in the CC Act defines the site of the Casino by reference to the site map, which may only be amended by proclamation from the Governor: at [196]-[200];
- (3) the PAC was correct in considering that the NSW Parliament had determined that the Casino was to be sited on public foreshore parkland and that the location of the Casino was effectively settled: at [201]-[205];
- (4) the PAC did not fail to properly exercise its powers under s75W of the EP&A Act, nor did it take into account irrelevant considerations when exercising its powers: at [206]-[218];
- (5) given the PAC had correctly construed and applied its powers under s 75W of the EP&A Act, there was no error of law: at [229]-[232];
- (6) given the modifications were valid, there was no error of law to render the SSD Determination invalid: at [238]-[239]; and
- (7) given the modifications were valid, the PAC did not take into account irrelevant considerations in relation to ss 79C(1)(c), 89E and 89H of the EP&A Act: at [253]-[261].

Protect Our Parks Incorporated v Wollongong City Council [\[2016\] NSWLEC 132](#) (Moore J)

(related decisions: ***Protect Our Parks Incorporated v Wollongong City Council*** [\[2016\] NSWLEC 99](#) (Moore J))

Facts: in the related decision, his Honour had determined that the development consent granted by Wollongong City Council (**the Council**) to Skydive the Beach and Beyond Sydney Wollongong Pty Ltd (**Skydive**) for the construction of a new operational base in Stuart Park at North Wollongong had been granted through a defective Council process in that the requirements to advertise the proposal had not been complied with and that this had vitiated the Council's approval process. That conclusion arose as a result of a judicial review challenge by Protect Our Parks Inc (**Protect Our Parks**). As a consequence of the related decision, it was necessary for consideration to be given to what relief (if any) should flow from it and as to what orders for costs were appropriate to be made.

Skydive submitted that the discretion should be exercised by refraining from granting any relief whilst Protect Our Parks sought a declaration of invalidity.

Issues:

- (1) whether Protect Our Parks should not be granted any relief at all or whether the Council should be required to carry out a compliant assessment process pursuant to orders made under s 25B of the [Land and Environment Court Act 1979 \(NSW\)](#) (**the Court Act**) which orders would set the terms for the proper processes or whether the development consent should be declared invalid thus requiring the Council to commence its assessment process afresh.

Held: suspending the development consent and ordering a fresh assessment process; costs in favour of Protect Our Parks

- (1) time was not of the essence for Skydive as it was acknowledged by Skydive that difficulties posed by the Stuart Park Plan of Management as the terms of any lease from the Council to Skydive required resolution before Skydive could act on any consent: at [16];
- (2) utilising s 25B of the Court Act would achieve the just, quick and cheap resolution of the issues genuinely in dispute between the parties: at [17];
- (3) it was appropriate to have regard to the nature of the defect in the Council's past processes and what influence the elimination of that defect might have on the Council's future assessment process: at [21];
- (4) suspending the development consent and the use of s 25B of the Court Act would enable the Council to consider any additional public submissions about whether or not the two structures should be demolished and, if persuaded that they ought not be demolished, to consider some further alternative location for, or modification to, the proposed development: at [26];
- (5) terms were set for the re-advertising and reassessment process: at [32];
- (6) the general presumption that costs follow the event was appropriate to be applied: at [36]-[38]; and
- (7) the council should pay one-eighth of Protect Our Parks' costs and Skydive seven-eighths of those costs: at [41]-[43].

Note: the active parties appeared before his Honour on 21 February 2017 when the Council moved, pursuant to s 25C(2) of the Court Act, that the suspended development consent be reinstated, subject to amended conditions, as the Council had carried out the processes required by the decision discussed above.

The necessary substantive orders were not opposed by either of the other active parties to the proceedings. Although the Protect Our Park sought its costs of attending on the motion, his Honour declined to make that order. Orders finalising these proceedings were then made.

Wollongong Coal Pty Ltd v Minister for Planning and Environment [\[2016\] NSWLEC 154](#) (Moore J)

(earlier procedural decision: ***Wollongong Coal Ltd v Minister for Planning*** [\[2016\] NSWLEC 113](#) (Pain J))

Facts: Wollongong Coal Pty Ltd (Wollongong Coal) owns a coal mine at Russell Vale in the Illawarra. The mine is presently not operating. In 2009, the former owner of the mine, Gujarat NRE Minerals Pty Ltd, had lodged a Project Application with the Minister for Planning (the Minister) seeking approval for an extension of the scope of the permitted underground workings of the mine. The proposal was made pursuant to the now repealed Pt 3A of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (the EP&A Act).

During the period after the lodgement of the proposal, another application (for works said to be preliminary to the proposal) (the Preliminary Project) was made to the Minister and has been approved. The Preliminary Project had also been modified since approval was given to it.

Although Pt 3A of the EP&A Act had been repealed, it continued to apply to the proposal, as this application had not been determined as at the date of repeal and the transitional provisions continued the operation of Pt 3A for the purposes of undetermined applications such as this.

The Minister referred the matter to the Planning Assessment Commission (the PAC) to undertake a second review of the project application. The project application had been reviewed, previously, by a differently constituted PAC panel. The Minister gave the PAC express terms of reference for the second review of the proposal. The PAC carried out the second review and prepared a second review report in response to the Minister's reference.

In June 2016, Wollongong Coal commenced judicial review proceedings concerning the PAC's second review report. Wollongong Coal alleged that the PAC had made a jurisdictional error of law in the way that it had considered the terms of [State Environmental Planning Policy \(Sydney Drinking Water Catchment\) 2011](#) (the Drinking Water SEPP) in this review (Ground 1); and, second, the PAC took into account a prohibited consideration, namely planning approvals outside the scope of the proposal, including previous modifications to approved development at the colliery (Ground 2).

Wollongong Coal sought orders setting aside the second review report and directing that the PAC, by a differently constituted panel, carry out a fresh review of the project in accordance with matters determined in these proceedings. A wide range of documentary material was tendered, including, particularly, Wollongong Coal's *Underground Expansion Project – Preferred Project Report*. Consideration of Wollongong Coal's complaints involved a detailed examination of the terms of the second review report of the PAC.

Issues:

- (1) did the PAC impermissibly have regard to the provisions of the Drinking Water SEPP; and
- (2) did the PAC take into account prohibited considerations, being planning approvals outside the scope of the proposal including previous modifications to approved development at the colliery.

Held: dismissing the proceedings and ordering Wollongong Coal to pay the Minister's costs:

- (1) it was not appropriate to undertake a fine-tooth-comb dissection of a PAC merit assessment report such as this: at [16]-[18];
- (2) the Minister (and in this case, the PAC upon reference from the Minister) can take into account the provisions of the Drinking Water SEPP but was not required to be satisfied that any mandated test had been met before recommending granting or granting approval to such a proposal: at [37];
- (3) the three reasons advanced by the Minister on the second element of ground 1 pressed by Wollongong Coal (that the PAC erroneously believed that the Drinking Water SEPP applied to the proposal) provided a correct and complete answer to Wollongong Coal's first complaint: at [66];
- (4) the fact that Wollongong Coal's own documents expressly invited consideration of cl 10(1) of the Drinking Water SEPP as a matter that the Minister (and the PAC on delegation from the Minister) might take into account was, in itself, a sufficient and complete answer to this complaint: at [82];
- (5) the correct inference was that the PAC considered the objectives of the Drinking Water SEPP in cl 3 rather than the test in cl 10(1). The statement that the PAC had regard to the objectives made two things clear. The first was that that which had taken place had been consideration rather than satisfaction of some mandated test, whilst the use of the word "objectives" was clearly a reference to cl 3 of the Drinking Water SEPP and particularly to cl 3(b): at [97];
- (6) as a consequence, the Minister's second basis for rejecting Wollongong Coal's first complaint was also made out: at [100];
- (7) the PAC merely had regard to the aims of the Drinking Water SEPP as one of a multitude of factors taken into account: at [101] and [102];
- (8) Ground 1 failed: at [106];
- (9) there was nothing in the PAC's explanation of how it reached its conclusion that could reasonably infer that the comment concerning cumulative impacts was anything other than merely an introductory observation. There was no indication that it was a matter taken into account in reaching the conclusion as set out at the end of the Executive Summary of the PAC's second review report: at [134] and [139];
- (10) there was nothing in the passages quoted in the judgement (or anything else set out in the conclusion to the Second Review Report) that indicated that the PAC's conclusion was founded upon speculation about future unapplied-for mining activities. It was clear that the totality of the conclusion was addressed to activities from past approvals and their impacts and such material as has been provided to the PAC Panel about the expected impacts of the current proposal: at 139];
- (11) properly viewed, there was nothing in either quoted passage that could lead to the conclusion that they founded the conclusion derived by the PAC and were, thus, impermissibly used. Nor did the PAC have regard to or rely on any irrelevant matter in deriving its conclusion: at [140];
- (12) Ground 2 failed: at [141]; and
- (13) if the conclusion on Ground 2 was incorrect, the paragraphs of upon which it was based were severable without impacting on the remainder of the substance of the Second Review Report, its conclusions or its recommendation: at [149].

- Compulsory Acquisition

Taylor v Roads and Maritime Services [2016] NSWLEC 138 (Pain J)

Facts: Roads and Maritime Services (RMS) compulsorily acquired land owned by Mr Taylor (the applicant) at Corindi Beach (the land), under the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\) \(the Just Terms Act\)](#). The land included planted areas of one and three hectares of blueberries, being a cyclical crop with a distinct ten year lifecycle. The applicant had acquired land adjacent to the land and had planted four hectares of blueberries, so mitigating his loss. Compensation for the market value of the land had been agreed while compensation for GST on legal and valuation fees (s 59(1)(a) and (b)), DA fees and utility connection as relocation expenses (s 59(1)(c)), post acquisition rental owing to RMS (s 59(1)(f)) and loss of profits (s 59(1)(f)) were in dispute with the respondent offering \$1,310,383 and the applicant claiming \$3,634,915 as compensation for loss of profits.

Issues:

- (1) whether GST on legal and valuation fees paid personally by the applicant (rather than being claimed as a business cost) was compensable under s 59(1)(a) and (b); .
- (2) whether DA fees and utility connection for a residence to be constructed on the land adjacent were compensable as relocation expenses under s 59(1)(c);
- (3) whether post-acquisition rental payable by the applicant to RMS is compensable under s 59(1)(f); and
- (4) whether the direct and natural consequence of the acquisition was the loss of 65 tonnes of blueberry production up to a point in four years' time when the adjacent land reached such a level of production or was that loss of blueberry production which allowed for the impact of lifecycle peaks and troughs in production on the land and the adjacent land, under s 59(1)(f).

Held: compensation payable in accordance with reasons given in an amount to be agreed by the parties:

- (1) GST had been paid personally by the applicant on legal and valuation fees and no evidence was tendered to support the claim of input tax credits by the business, such that the GST paid by the applicant is compensable under s 59(1)(1) and (b): at [72];
- (2) focusing on the terms "financial costs reasonably incurred in connection with the relocation", given the absence of evidence to support the claim and the existence of a house on the adjacent land, to compensate for DA fees for and utility connection to a new house to be constructed on the land would be double dipping and so not compensable as relocation expenses under s 59(1)(c): at [75] and [76];
- (3) section 34(4) does not prevent the applicant claiming rent payable as compensation under s 59(1)(f), consistent with previous authority: at [77] and [78]; and
- (4) focusing on the terms "actual" and "direct and natural consequence" in s 59(1)(f), the applicant suffered an actual loss of 65 tonnes of blueberry production at the date of acquisition with the direct and natural consequence being the loss of profits for that period of four years until such a level of production was again achieved, discounted by the time value of money: at [35], [43] and [65].

- Criminal

Chief Executive of the Office of Environment and Heritage v Crown in the Right of New South Wales (National Parks and Wildlife Service which is a part of the Office of Environment and Heritage) [2016] NSWLEC 147 (Robson J)

Facts: a field officer of the NSW Office of Environment and Heritage (OEH) cleared a trail at the Clybucca Historic Site using a tractor and an attached slashing implement. The slashing implement was damaged, and therefore caused substantial damage to a number of estuarine Aboriginal middens. The

defendant, NSW National Parks and Wildlife Service (NPWS) pleaded guilty to the offence under s 86(1) of the [National Parks and Wildlife Act 1974 \(NSW\)](#) (the NPW Act).

Issues:

- (1) what are the objective circumstances of the offence;
- (2) what are the subjective circumstances of the defendant; and
- (3) what is the appropriate sentence.

Held: the defendants were convicted as charged and fined a sum of \$45,000. The Court also made a publication order requiring the defendant to place notices in the form annexed to the orders in certain newspaper publications. The defendant was ordered to pay the Prosecutors costs and disbursements as agreed or assessed:

- (1) the shells, bones and artefacts contained within the middens, as well as the middens themselves, were "Aboriginal objects" and the damage caused constituted 'harm' for the purposes of s 5(1) of the NPW Act: at [10];
- (2) the Crown was aware that the middens were Aboriginal objects: at [10];
- (3) the physical harm caused to the Aboriginal objects by the clearing works was considerable, and there had been substantial emotional harm arising as a result of the offence: at [80], [85];
- (4) both the midden complex and the Aboriginal objects held educational, scientific and cultural value and were therefore of significance: at [97];
- (5) there was a substantial systemic failure on the part of the Crown through the National Parks and Wildlife Service to take appropriate steps to prevent harm to the Aboriginal objects: at [111];
- (6) the harm caused was reasonably foreseeable, and the Crown had complete control over the causes of the harm: at [112]-[113];
- (7) the Crown should be considered a corporation for the purposes of s 86 of the NPW Act: at [122];
- (8) the harm to the Aboriginal objects was not intentional, however the Crown was recklessly indifferent as to whether it caused harm: at [132]-[133];
- (9) the offence was of low to moderate objective gravity: at [138];
- (10) the subjective circumstances of the Crown, particularly the prospects of rehabilitation and cooperation with law enforcement authorities, mitigated the penalty that would otherwise be imposed by the Court to a moderate degree: at [159];
- (11) the Crown's guilty plea entitled it to a discount of its sentence at the upper end of the range approximately 25%: at [168]; and
- (12) when comparing the offence in this case to offences in comparable cases, each was subject to a lower maximum penalty, did not involve a corporation and involved harm less widespread than that of the present case. Accordingly the present sentence should be larger than those ordered in like cases: at [180] – [181].

Environment Protection Authority v Caltex Australia Petroleum Pty Ltd [\[2017\] NSWLEC 8](#)
(Sheahan J)

Facts: the Environment Protection Authority ("EPA") prosecuted Caltex Australia Petroleum Pty Ltd ("Caltex") for a leak of more than 157,000 litres of petroleum product at Caltex's Banksmeadow Terminal. The leak occurred during an "abnormal process" involving transferring petroleum product from a tank at the Terminal during a night-shift. One of the contract workers involved in the incident was intoxicated at the time. The leak was contained in the bunded area surrounding the tank, but a vapour cloud of petroleum also formed in the vicinity. The incident triggered a major emergency response by NSW Fire & Rescue ("NSWF&R"). In order to stop the flow of petroleum product, a senior NSWF&R officer waded through the petrol gushing into the air and gathering in the bund, and manually shut off the relevant valve.

Caltex pleaded guilty at "the first reasonable opportunity" to a Tier One offence under the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (the POEO Act), to which Caltex had pleaded guilty at "the

first reasonable opportunity". Section 116 covers leaks, spillages and other escapes that are wilfully or negligently caused by a person, in a manner that harms or is likely to harm the environment. The EPA charged Caltex under this section, with, being the occupier of the subject land, and "negligently, in a material respect" contributing to the conditions that gave rise to the commission of an offence under s 116, by the worker involved. Since the charge brought against Caltex did not allege any "wilful" element, the relevant maximum penalty for Caltex was a fine of \$2 million (s 119). In addition to the entering of a conviction, imposition of a fine, and an order against the defendant for costs, the prosecutor sought orders to be made by the Court pursuant to s 250(1) of the POEO Act, requiring;

- (a) the placement of notices in the media, and in Caltex's Annual Report;
- (b) the payment of 50% of the amount of any fine imposed to each of the following projects:
 - (i) "bushcare and bushland management project in Sir Joseph Banks Park", and
 - (ii) "stocking Mulloway to enhance recreational fishing opportunities in Botany Bay"; and
- (c) the acknowledgement of the fact of conviction in any public references to the payments in (2).

Issues:

- (1) the Court was required to determine and impose the appropriate penalty for the offence pursuant to ss 3, 3A and 21A of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#), and s 241 of the POEO Act.

Held: the Court convicted Caltex of the offence as charged, and ordering the company to pay \$200,000 to each of the two projects nominated in the prosecutor's draft orders (specified above), in addition to the prosecutor's costs in the agreed sum of \$450,000. Caltex was ordered to publicise the offence in three newspapers as well as in Caltex's next Annual Report, and to provide the EPA with a complete copy of the page of the publications in which the notice appears within 14 days of their date of publication.

- (1) objective seriousness and relative culpability: The offence was of moderate objective seriousness: at [98];
- (2) the harm caused to the environment, being mainly to air and to human health, was generally minor and transient: at [93];
- (3) the incident was a major "spill" event, which involved large volumes of a dangerous and highly flammable substance, but, fortuitously, it failed to reach its adverse potential: at [85];
- (4) Caltex's negligence in failing to follow its own procedures and providing poor equipment to the employee that caused the incident, reached the criminal standard necessary to found the charge, but it was not found to be an aggravating feature: at [90]. Caltex was in control of the causes that gave rise to the offence and knew of practical measures it could have taken to prevent, control, abate or mitigate the harm: at [96];
- (5) since ignition of the spilled product was not likely, the risk of ignition did not fall within the scope of s 241(1)(c), which correlates foreseeability with the harm element and not the incident itself: at [97];
- (6) subjective circumstances and mitigating factors: Caltex undertook "comprehensive rectification and improvement measures", following the incident: at [101];
- (7) it demonstrated extensive community involvements: at [102]. The guilty plea made at an early stage entitled it to a discount of 25%: at [103];
- (8) the Court applied a further discount for the exemplary assistance that Caltex provided to the authorities: at [104];
- (9) Caltex did not have a 'significant record' of past offences: at [105];
- (10) the prospects of the company reoffending were held to be slight, and the need for specific deterrence was low: at [106];
- (11) the Court held that "just" punishment and general deterrence were required: at [106]; and
- (12) Caltex demonstrated contrition and remorse, and there was extensive evidence of rehabilitation and systemic change across the company: at [107].

Environment Protection Authority v Complete Asbestos Removal Pty Ltd; Environment Protection Authority v Endacott [2016] NSWLEC 167 (Preston CJ)

Facts: Complete Asbestos Removal Pty Ltd (**CAR**) was contracted to demolish houses on properties owned by Cobbora Holding Company Pty Ltd (**Cobbora**) and lawfully dispose of the demolition waste.

Mr Peter Endacott, the sole director of CAR, forged an asbestos removal clearance report and a bonded asbestos clearance certificate for one of Cobbora's properties. Mr Endacott also forged nine weighbridge dockets. Finally, Mr Endacott forged eight bonded asbestos clearance certificates for eight of Cobbora's properties. All of these forged documents were supplied to Cobbora between 21 November 2013 to 16 October 2014. CAR subsequently provided forged records to the Environment Protection Authority ("EPA") on 17 April 2015.

Mr Endacott pleaded guilty to three offences of knowingly supplying false or misleading information about waste under s 144AA(2) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**the POEO Act**) and CAR pleaded guilty to the offence of knowingly furnishing false or misleading information in purported compliance with ch 7 of the POEO Act under s 211(2) of POEO Act.

Issues:

(1) what were the appropriate penalties for Mr Endacott's three offences against s 144AA(2) of the POEO Act and CAR's offence against s 211(2) of POEO Act.

Held: CAR and Mr Endacott were convicted of all of the offences as charged:

- (1) penalties: Mr Endacott was fined \$72,000 for the offence of providing the forged asbestos removal clearance report and bonded asbestos clearance certificate, \$18,000 for the offence of providing the false weighbridge documents and \$24,000 for the offence of providing the eight forged bonded asbestos clearance certificates. CAR was fined \$24,000 for the offence of providing those same eight clearance certificates to the EPA;
- (2) objective circumstances: Mr Endacott's offences of providing (a) the forged asbestos removal clearance report and bonded asbestos clearance certificate was of medium objective seriousness: at [102(d)]; (b) the false weighbridge documents was at the lower end of objective seriousness: at [102(b)] and (c) the eight forged bonded asbestos clearance certificates was of low to medium objective seriousness: at [102(c)]. CAR's offence of providing eight clearance certificates to the EPA was at the lower end of objective seriousness: at [102(a)]
- (3) the maximum penalty under s 144AA(2) of the POEO Act is, in the case of an individual, \$240,000 or imprisonment for 18 months, or both: at [68]. The maximum penalty under s 211(2) of the POEO Act is, in the case of a corporation, \$1,000,000: at [68];
- (4) none of the offences caused harm or were likely to cause harm to the environment: at [70], [72], [76] and [77];
- (5) Mr Endacott could and should have taken practical measures to prevent harm to the environment however it was not established that these actions would have prevented any harm to the environment: at [78], [79];
- (6) it was clearly foreseeable that providing false documents might cause harm to human health and the environment: at [81];
- (7) CAR and Mr Endacott had full control over the causes that gave rise to the offences: at [82];
- (8) the offences were not isolated incidents, however this is already captured by the multiple charges laid against Mr Endacott and CAR and does not increase the objective seriousness of each offence: at [86];
- (9) the evidence did not establish that CAR and Mr Endacott committed the offences without regard for public safety: at [89];
- (10) the evidence did not establish that the offences committed by CAR and Mr Endacott were part of a planned or organised criminal activity: at [96];
- (11) CAR did benefit financially by the commission of the offences: at [100];
- (12) subjective circumstances: CAR and Mr Endacott's early pleas of guilty justified a 25% discount on the monetary penalty for each charge: at [104];

- (13) CAR and Mr Endacott had no prior convictions: at [105]. Mr Endacott was of good character: at [111]. Mr Endacott was genuinely remorseful for the offences committed by him and CAR despite taking some time to accept full responsibility for all of his actions: at [115]. CAR and Mr Endacott are unlikely to reoffend: at [116]. CAR and Mr Endacott cooperated with the EPA to an extent: at [118];
- (14) purposes of sentencing: the Court needs to ensure that CAR and Mr Endacott are adequately punished for the offences, to hold them accountable for their actions, and to denounce the conduct of CAR and Mr Endacott in proportion to the seriousness of the offences: at [120]. General deterrence is important to deter other persons who might be tempted to supply false or misleading information about waste to other persons or to the EPA: at [121]. There is no particular need for specific deterrence of CAR or Mr Endacott: at [122];
- (15) totality principle: it was appropriate to reduce the aggregate of the fines for the offences committed by CAR and Mr Endacott involving the supply of the false bonded asbestos clearance certificates. The aggregate of those otherwise appropriate fines was \$96,000. This was adjusted to \$48,000 and apportioned \$24,000 to each of CAR and Mr Endacott: at [132]; and
- (16) costs: the Court ordered CAR and Mr Endacott to pay the EPA's legal costs in the sum of \$25,000 each: at [137].

Environment Protection Authority v Custom Chemicals Pty Ltd [2016] NSWLEC 146 (Preston CJ)

Facts: Custom Chemicals Pty Ltd (the “defendant”) carried on a business of repackaging and reselling chemicals, including highly concentrated acids and alkalis, at premises in Tomago. The premises were adjacent to a pond flowing into a creek, which entered wetlands leading to the Hunter River. Between 1 July 2014 and 17 June 2015, the defendant polluted the waters of the pond and the creek by deliberately and repeatedly pumping liquid containing a chemical mixture from a holding tank into the pond. Throughout this period, 30 different chemicals were rinsed from chemical containers onto a hardstand that drained into the holding tank. The defendant estimated that one tonne of water treatment products, 300 kg of sodium hydroxide, 200 kg of chlorine, 300 kg of sulphuric acid, 500 kg of hydrochloric acid and an unspecified amount of dry-cleaning fluid drained or washed into the holding tank. Whenever the holding tank was filled, its contents were discharged through a pipe into the nearby pond. Officers of the Environment Protection Authority (the “Prosecutor”) observed the pollution of waters on 17 June 2015, gave a verbal clean-up direction to the defendant on 18 June 2015 and issued a formal clean-up notice on 19 June 2015. The defendant pleaded guilty to the offence of polluting waters in contravention of s 120(1) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (the **POEO Act**).

Issues:

- (1) the Court was required to determine and impose the appropriate penalty for the offence pursuant to s 21A of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) and s 241(1) of the Act.

Held: the defendant convicted of the offence as charged; ordered to pay \$300,000, in instalments, as contribution to an environment restoration project; ordered to pay \$60,000 to the NSW Environmental Trust; ordered to cause its employees to undertake an environmental training course; ordered to publicise offence in newspapers; ordered to pay the Prosecutor's investigation costs and expenses of \$23,567.50; and ordered to pay the Prosecutor's costs of \$40,000:

- (1) objective circumstances: the offence was of medium objective seriousness: at [91];
- (2) the defendant's conduct undermined the statutory scheme regulating water pollution: at [62];
- (3) the maximum penalty for the offence was \$1,000,000 under s 123(a) of the Act: at [63];
- (4) the environmental harm caused or likely to be caused by the offence was significant and substantial taking into account: the number, frequency and repetition of discharges; the volume of pollutants discharged; the hazardous, dangerous and environmentally harmful nature of the pollutants; the nature of the receiving environment; and the extent of the receiving environment harmed (over 200 m of waterways): at [67];
- (5) any reasonable person in the defendant's position would have foreseen that discharging the chemicals into the pond would cause or was likely to cause environmental harm: at [71];

- (6) practical measures to avoid the environmental harm were readily available and the defendant failed to implement any of these measures: at [81];
- (7) the defendant had complete control over the causes that gave rise to the offence: at [83];
- (8) the gravity of the offence was increased by the considerable period of time over which the offence was committed: at [85];
- (9) the defendant obtained financial gain by avoiding incurring any expenses in disposing of the contents of the holding tank: at [90];
- (10) subjective circumstances: the defendant's early plea of guilty justified a 25% discount on the overall monetary penalty: at [93];
- (11) the defendant was genuinely remorseful for committing the offence: at [101]; the defendant had no prior convictions: at [102];
- (12) the defendant was of good corporate character: at [103]; the defendant was unlikely to re-offend: at [104];
- (13) the defendant cooperated with and provided assistance to the prosecutor: at [108]; \
- (14) purposes of sentencing: the sentence should deter those carrying out activities near waters, and those who carry out chemical handling businesses in particular, from polluting waters: at [111]-[112]; and
- (15) however, taking into account the subjective circumstances of the offence, there was no need for specific deterrence of the defendant: at [113].

Environment Protection Authority v Morgan Cement [\[2016\] NSWLEC 140](#) (Pepper J)

Facts: Morgan Cement International Pty Ltd (**Morgan Cement**) produced cement and ground blast furnace slag (**slag**) at premises in Port Kembla (**the premises**). The slag was stored in one of three silos. The amount of slag stored in a silo was controlled by a device called a Roto-Bin-Dicator (**RBD**), and the capacity of the silos was measured by a sensor. Slag was being transferred to Silo A when the RBD developed a fault and failed to stop the transfer of slag. The sensor also failed to report that the silo was at capacity. In the event that a silo over-filled, surplus slag was supposed to be diverted, via a flap valve, to the ground and contained on the premises. This did not happen because over time the slag had sealed shut the flap valve. Consequently, slag was emitted into the atmosphere and deposited over a distance of 1.5 kilometres to the south and south-west of the premises. No people were harmed by the incident. Morgan Cement paid the costs residents incurred in cleaning slag from their property.

Condition O2.1 of Morgan Cement's environment protection licence (**EPL**) required all plant and equipment be maintained in a proper and efficient manner ("the condition"). Morgan Cement were charged with, and pleaded guilty to, breaching the condition in relation to the failure of the flap valve. Breach of a condition of an EPL is an offence under s 64(1) of the [Protection of the Environment Operations Act 1997](#).

Issues

- (1) what was the appropriate penalty to be imposed in all the circumstances.

Held: fining Morgan Cement \$50,250 and ordering Morgan Cement to publish details of the offence and penalty, and to pay the prosecutor's legal costs of \$55,000:

- (1) there was actual harm to the environment because the slag was emitted into the atmosphere: at [97];
- (2) while there was insufficient information available to determine the actual or potential exposure by residents to the slag, there were no observed or reported adverse health impacts from the incident: at [108]-[110];
- (3) the offence caused environmental harm in the lower to middle end of the spectrum: at [111];
- (4) there were a number of practical measures available to Morgan Cement to prevent the environmental harm from occurring, including developing and implementing an effective inspection program to ensure the flap valve was operative: at [119]-[124];

- (5) following the incident, Morgan Cement replaced and upgraded the RBD and sensor, installed a new flap valve, and updated its operating and monitoring systems: at [125]-[126]; and
- (6) Morgan Cement had no prior convictions, was a good corporate citizen (it had a long running commitment to the preservation of a local colony of the endangered Green and Golden Bell Frog), entered a guilty plea at the first opportunity, and assisted the authorities in their investigation of the commission of the offence: at [135]-[143].

Environment Protection Authority v Wellington Council [2017] NSWLEC 5 (Moore J)

Facts: in 2015, the Environment Protection Authority commenced a prosecution against Wellington Council (**the old Council**) for water pollution, as a consequence of the discharge of untreated or partially treated effluent from a sewage treatment plant into a watercourse. In August 2015, the old Council entered a plea of “guilty” to the offence. In May 2016, the *Local Government (Council Amalgamations) Proclamation 2016 (the First Proclamation)* came into effect. The First Proclamation, relevantly, dissolved the old Council and amalgamated it with Dubbo City Council to form a new regional council, now known as Dubbo Regional Council (**the new Council**). The new Council sought to have the prosecution of the old Council struck out on the basis that the First Proclamation was ineffective in carrying forward the prosecution against the new Council. During the course of the first phase of the hearing on this point, the *Local Government (Bayside) Proclamation 2016 (the Second Proclamation)* took effect. The Second Proclamation amended the First Proclamation, inter alia, by inserting a new provision dealing with criminal proceedings commenced by or against councils amalgamated by virtue of the First Proclamation. The new Council pressed that the prosecution should be struck out, despite the coming into effect of the Second Proclamation.

Issues:

- (1) as the new Council was not named as the defendant to the prosecution, how should the proceedings seeking to strike out the prosecution against the old Council be characterised;
- (2) what was the effect of the Second Proclamation on the strikeout application;
- (3) had the First Proclamation, clearly and unambiguously by its terms, transmitted the prosecution of the old Council to continue as a prosecution against the new Council;
- (4) if not, had the entry of “guilty” plea by the old Council had the effect of provisionally convicting the old Council of the offence charged;
- (5) if so, did that provisional conviction have the effect of carrying forward liability of the new Council to be made subject to orders pursuant to Pt 8.3 of the [Protection of the Environment Operations Act 1997 \(the POEO Act\)](#) so that the prosecution continued;
- (6) if the old Council had been provisionally convicted, did that have the effect of carrying forward to the new Council liability for an order that the new Council pay the Prosecutor's costs pursuant to s 257 of the [Criminal Procedure Act 1986 \(NSW\) \(the CP Act\)](#), so that the prosecution continued;
- (7) if the prosecution did not remain on foot against the new Council and was struck out, was the new Council entitled to a costs order against the Prosecutor for the strikeout proceedings.

Held:

- (1) the proceedings should, properly, be dealt with as an application by the Prosecutor to substitute the name of the new Council for that of the old Council in the proceedings with the new Council being treated as intervening to oppose such an application: at [101];
- (2) absent consent from the new Council (which was not given), the Second Proclamation could not effect transmission of the prosecution from the old Council to the new Council: at [25] and [103];
- (3) the First Proclamation did not, by clear and unambiguous language, transmit the prosecution from the old Council to the new Council: at [51] and [56];
- (4) however, the entry of the “guilty” plea by the new Council prior to the coming into effect of the First Proclamation had the effect of provisionally convicting the old Council of the offence charged (in reliance on the decision of the High Court in *Maxwell v The Queen* [\(1996\) 184 CLR 501; \[1996\] HCA 46](#)): at [70]-[72];

- (5) this necessitated consideration of whether liability for orders under Pt 8.3 of the POEO Act and/or costs orders pursuant to the CP Act were transmitted to the new Council as a consequence of the provisional conviction: at [63];
- (6) the terms of s 243 of the POEO Act were necessary to be satisfied before liability for orders under Pt 8.3 of that Act could be transmitted and that those requirements had not been satisfied: at [83]-[86] and [88];
- (7) similarly, the requirements of s 257 of the CP Act were necessary to be satisfied before liability for a costs order in favour of the Prosecutor could be transmitted to the new Council and that those requirements had not been satisfied: at [89]-[92];
- (8) as a consequence, there had been no transmission of the prosecution from the old Council to the new Council, with the result that the application to substitute the new Council for the old Council should be refused and the prosecution struck out: at [104];
- (9) although the new Council was successful in having the prosecution struck out, the CP Act only makes provision for costs orders in favour of an “accused person” when a prosecution is unsuccessful: at [98]; and
- (10) as the new Council had successfully resisted being substituted for the old Council, the new Council had never been an “accused person” for the purposes of the costs provisions under the CP Act and, therefore, was not entitled to a costs order in its favour on this strikeout application: at [99]-[100].

Moseley v Queanbeyan-Palerang Regional Council [\[2016\] NSWLEC 165](#) (Pain J)

Facts: Mr Moseley (**the appellant**) appealed against the conviction and sentence imposed on him by Queanbeyan Local Court on 21 June 2016. The appellant had been issued with a Penalty Infringement Notice by the Council for excavation and other works associated with the intended construction of a house and dam on his rural property which works were carried out without development consent. In the Local Court, the appellant contended that the works were exempt development under the Palerang Local Environmental Plan 2014 (**the PLEP**) and [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008 \(the SEPP\)](#). He was convicted of an offence under s 125(1) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(the EP&A Act\)](#) that he carried out development without consent contrary to s 76A of the EP&A Act in relation to various excavation works. The appellant was fined and ordered to pay the Council’s professional costs.

Issues

- (1) whether the Council had negatived beyond reasonable doubt that the activity giving rise to the charge is not exempt development under:
 - (i) the PLEP, which permits without development consent earthworks that are ancillary to development that is permitted without consent, specifically “extensive agriculture”; and
 - (ii) the SEPP, which permits without development consent earthworks and the construction of farm buildings that meet specified development standards.

Held: conviction appeal dismissed:

- (1) the construction of a creek crossing, 500m track, house site and dam did not qualify as exempt development under cl 6.1(2)(b) of the PLEP. The appellant did not dispute that there was no agricultural activity taking place on the land. There was also insufficient evidence that the use of the land for agriculture was imminent: at [43]-[44];
- (2) prima facie, as extensive agriculture was not being carried out on the land during the charge period the creek crossing, track, house site and dam could not be ancillary to such a use: at [44], [59], [66], [74];
- (3) the Court was also not satisfied that the dam was a “farm dam” for the purposes of cl 3.1(2) of the PLEP: at [47];
- (4) the earthworks associated with the creek crossing, track, dam, shed site and four stockpiles did not qualify as exempt development under subdiv 15 (Earthworks) of the SEPP as the development

standards in cl 2.30 were not met. The creek crossing and track occurred within 40m of a water body contrary to cl 2.30(d) of the SEPP: at [52], [60];

- (5) excavations and fill for the dam, shed site and stockpiles exceeded 600mm meaning they cannot qualify as exempt development under cl 2.30(a): [74], [84], and [89]; and
- (6) the shed site was also greater than the maximum area permitted in cl 2.32(1)(b)(ii) which allows development without consent for farm buildings no greater 200m²: at [83].

Note: sentencing appeal to be heard separately on 10 February 2017.

Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure Investments Pty Limited [2017] NSWLEC 2 (Moore J)

Facts: AGL Energy Limited is the developer and operator of a wide range of energy projects in New South Wales. AGL Upstream Infrastructure investments Pty Limited is a subsidiary of AGL Energy Limited (together, **AGL**). AGL frequently seeks approval for the development of its projects or to modify approvals for existing projects. For the 11 projects giving rise to these prosecutions, AGL had applied to the Minister for Planning for such approvals, but had omitted to disclose, at the relevant statutorily mandated time, a number of political donations.

In mid-2008, the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) had been amended to make it mandatory that, at the time of making an application for development approval or for modification of an existing development approval, political donations above a specified donation limit (whether individually or in aggregate) were required to be disclosed at the time of making the application or, if made after the application, were made within a specified period after the application. AGL failed to disclose political donations, as required by the statutory regime, for 11 project applications or modification applications. The Secretary of the Department of Planning and Environment prosecuted AGL for these 11 breaches. For 9 of the offences, AGL had failed to disclose more than one reportable donation whilst, for the remaining 2 offences, only a single donation had failed to be disclosed. The offences were committed between 2010 and 2014. The prosecutions of AGL were pursuant to s 125 of the EP&A Act. The maximum penalty at the time of the offences was twelve months jail and/or a maximum fine of \$22,000.

At the hearing, an agreed statement of facts was tendered. This contained details of all of the project applications/modification applications involved; the nature and amount of each political donation that had not been disclosed; and the fact that the Prosecutor accepted that these failures to disclose resulted from an administrative breakdown in AGL's internal systems and were not deliberate. It also revealed that the donations were made to both major political groupings in New South Wales.

The agreed statement of facts also disclosed that, in May 2016, AGL's board had revised company policy and that, as a consequence, that policy now banned all political donations by AGL entities.

After the various offences had been committed but prior to the prosecutions being commenced, the EP&A Act had been amended to make available, as outcomes upon conviction, the availability of additional orders of the type provided for in Pt 8.3 of the [Protection of the Environment Operations Act 1995 \(NSW\)](#), the range of orders thus potentially available included requiring AGL to publish notices giving details of the prosecutions and the penalties imposed.

Finally, s 122 of the [Fines Act 1996 \(NSW\)](#) (**the Fines Act**), makes provision for the ability to make an order requiring that up to one half (a moiety) of any penalties imposed were to be paid to the prosecutor.

AGL pleaded guilty at the earliest opportunity and was therefore entitled to the maximum discount on penalty envisaged by s 22 of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) (**the Sentencing Procedure Act**).

Issues:

- (1) what was the appropriate penalty to be imposed for each offence;
- (2) how should the resulting aggregated penalty be adjusted to reflect principles of totality and accumulation;

- (3) was it appropriate to order publication by AGL of notices concerning the convictions and penalties; and
- (4) was it appropriate to grant the prosecutor a moiety (of up to 50%) of the total penalty pursuant to s 122 of the Fines Act;

Held: convicting AGL; imposing a total fine of \$124,000; not making publication orders; ordering a moiety of the total penalty be paid to the prosecutor; and ordering AGL to pay the prosecutor's costs:

- (1) although the maximum fine was only \$22,000, the concurrent availability of a jail sentence indicated that the legislature considered that offences of this type were of a serious nature (adopting the reasoning of Craig J in *Director-General, Department of Planning and Infrastructure v Aston Coal 2 Pty Ltd* [2013] NSWLEC 188): at [50];
- (2) each of the offences where the failure to disclose more than one donation was involved should be regarded as being or the upper end of the range of seriousness whilst those involving a single failure to disclose should be regarded as above the mid-range of seriousness: at [102];
- (3) the appropriate penalty to impose for each of the offences and the more serious category was \$18,000 whilst that, for the less serious category should be \$12,000 per offence: at [103];
- (4) having regard to the full range of the objective and subjective factors concerning the offences and AGL and making the maximum 25% discount for the early guilty pleas, it was appropriate to reduce each of the penalties by one-third: at [110];
- (5) this resulted in an overall total penalty of \$124,000: and [111];
- (6) AGL was to pay the prosecutors costs: at [114];
- (7) publication notices were to be regarded as penalties and could not be applied retrospectively (Sentencing Procedure Act – s 19(1)), as a result, no publication order could be made: at [133]; and
- (8) despite the coming into effect of the amendments to the EP&A Act, which amendments also permitted the making of orders for the reimbursement of prosecutors expenses, in the circumstances of this case, it was appropriate to make an order under the Fines Act for payment of half the total penalty to the Prosecutor: at [156].

- Contempt

Canterbury City Council v Ali Ahmed [2016] NSWLEC 160 (Robson J)

Facts: on 3 June 2016, Craig J found, in *Canterbury City Council v Ahmed* [2016] NSWLEC 68, that Ali Ahmed and Auto Group Australia Pty Ltd (“the defendants”) were guilty of contempt insofar as they repeatedly operated outside of hours in contravention of Court orders in proceedings that had been brought by Canterbury City Council (**the Council**) in 2012. The defendants were involved in upgrading vehicles at a workshop.

Issues:

- (1) the correct sentencing principles to be applied where a defendant is found guilty of contempt; and
- (2) the appropriate sentence in light of these principles.

Held: Mr Ahmed and Auto Group Australia were fined \$15,000 each:

- (1) the factors for determining a sentence in contempt proceedings were correctly outlined by Dunford J in *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 at 185: at [17];
- (2) section 3A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**the Sentencing Procedure Act**) provides guidelines in civil contempt proceedings brought pursuant to r 55.12 of the *Supreme Court Rules 1970 (NSW)*: at [19]-[20];
- (3) the civil contempt, whilst not contumacious, was the result of intentional conduct, by persons who were aware of complaints (and therefore the consequences of their actions), for the commercial gain of running the workshop outside of operating hours: at [22]-[24], [27];

- (4) there was no evidence of contrition from either of the defendants, and there was at least some need for both general and specific deterrence: at [28], [31], [33];
- (5) whilst there was some delay between the hearing and conviction, there was no evidence of hardship to either of the defendants, and as such this is not a mitigating factor: at [41];
- (6) the range of sentences for civil contempt summarised by Biscoe J in *Waverley Council v Tovir Investments Pty Ltd (No 4)* [2013] NSWLEC 88 at [34] of \$7,500 to \$50,000 were appropriate in these proceedings: at [43]-[44];
- (7) whilst s 6 of the *Fines Act 1996 (NSW)* applies to civil contempt proceedings, there was no evidence that suggested the respondents lacked means to pay a substantial fine: at [50]; and
- (8) there is a question as to whether s 10 of the Sentencing Procedure Act applies to civil contempt hearings, and an order would be inappropriate in any event.

- Civil Enforcement

Pasminco Cockle Creek Smelter Pty Limited (subject to Deed of Company Arrangement) v Lake Macquarie City Council [2016] NSWLEC 143 (Robson J)

Facts: the applicant, Pasminco Cockle Creek Smelter Pty Ltd (**Pasminco**), sold a 9-hectare block of land (**the TriPad site**) to the second respondent, Bunderra Holdings Pty Ltd (**Bunderra**), in October 2014. Pasminco remained the owner of other land to the northeast of the TriPad site.

Since purchasing the TriPad site, Bunderra had undertaken works to subdivide the property. This involved having a number of reports prepared, and obtaining the consent of the first respondent, Lake Macquarie City Council (**the Council**). Both the reports and the consent referred to a pipe that was to be built from the TriPad site under a road to the border of the Pasminco site (**Main Road pipe**).

On 17 May 2016, Bunderra sought a subdivision certificate from Council. Bunderra had not constructed the Main Road pipe at this stage, nor had it constructed it prior to the hearing, as it had formed the opinion that it was not obliged to do so. Pasminco was of the opinion that Bunderra was obliged to construct the Main Road pipe, and commenced Class 4 proceedings seeking declaratory and injunctive relief against Bunderra and Council to prevent the subdivision certificate being issued before the Main Road pipe was constructed.

Issues:

- (1) whether Bunderra was required to construct the Main Road pipe pursuant to the consent.

Held: the consent required that Bunderra construct the Main Road pipe, and Council was restrained from issuing a subdivision certificate until it had been completed:

- (1) the ambiguities in condition 16, the relevant condition of the consent, when read as a whole do not refer to different works and requests for information, but the same works and requests for information: at [66];
- (2) the content of the earlier reports, and in particular the requirement to obtain a further consent for the Main Road pipe, were varied by the terms of the consent, as condition 16 required certain works (including the Main Road pipe construction) to be undertaken: at [69]-[75];
- (3) the works should be undertaken prior to the subdivision certificate being issued in compliance with the terms of the consent: at [76];
- (4) alternatively, whilst a further report providing a specific design to the Main Road pipe was not explicitly incorporated into the consent, it can be incorporated into the consent by way of necessary implication (see Meagher JA in *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103 at [43]) because the report was a revision of a prior report which sought to rectify certain inadequacies, was necessary to give s 80A(4) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) practical effect, was prepared in response to the requests for information in condition 16, and provides necessary details regarding how the Main Road pipe should be constructed: at [90]; and

- (5) simply because construction certificate plans do not satisfy a consent does not mean that those unsatisfied conditions of the consent should simply be disregarded under s 80(12) of the EP&A Act: at [98].

Williams v Graham [2016] NSWLEC 151 (Preston CJ)

Facts: development consent for the carrying out of a basalt quarry on a plateau at Cedar Point near Kyogle was granted on 21 June 2012. The construction of the quarry commenced on 28 July 2016. Mr Williams (**the applicant**), a Gidubul (Githabul) man, brought proceedings under s 193 of the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**the NPW Act**) seeking to restrain the operators of the quarry and the landowners from carrying out the quarry until the issuing of an Aboriginal heritage impact permit under s 90 of the NPW Act. The applicant's claim was founded upon a threatened or apprehended breach of s 86(2) of the NPW Act, which prohibits a person from harming an Aboriginal object. The applicant claimed that Aboriginal stone artefacts were likely to be present within the quarry disturbance area and that the quarrying operations would harm these Aboriginal objects.

Issues:

- (1) whether, on the balance of probabilities, there were any Aboriginal objects on the land to be quarried; and
- (2) whether the quarrying activities constituted a threatened or apprehended breach of s 86 of the NPW Act.

Held: proceedings dismissed:

- (1) it was not established that Aboriginal stone artefacts were present within the quarry disturbance area: at [71];
- (2) no Aboriginal stone artefacts were discovered within the quarry disturbance area despite numerous people looking out for Aboriginal objects including: archaeologists, who conducted Aboriginal heritage inspections; Aboriginal people with cultural heritage knowledge, who inspected the land; the landowner, who worked on the land for 50 years and had a demonstrated interest in Aboriginal objects; and the quarry supervisor, who carried out earth moving works: at [57];
- (3) the Court did not accept the three bases supporting the applicant's expert archaeologist's conclusion that there was likely to be Aboriginal objects within the quarry disturbance area: at [60];
- (4) first, the making of an assumption under the relevant (precautionary) policy code that there might be Aboriginal objects within the quarry disturbance area could not prove the presence of Aboriginal objects: at [65];
- (5) second, the evidence of the applicant that there were toolmaking sites associated with an initiation site within the quarry disturbance area was inconsistent with the evidence of an Aboriginal elder of the Gulli-bul tribe, on whose tribal lands the quarry was located, and the evidence of the archaeologists: at [67]-[69];
- (6) third, to assert that, because of inadequate archaeological testing, it has not been proven that Aboriginal objects are not present does not prove that Aboriginal objects are in fact present: at [70]; and
- (7) given that the applicant did not establish that there were Aboriginal stone artefacts within the quarry disturbance area, no threatened or apprehended breach of s 86 of the Act was established: at [72].

- Aboriginal Land Claims

La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act (No2) [2016] NSWLEC 137 (Sheahan J)

Facts: La Perouse Local Aboriginal Land Council (**the applicant**) made "land rights claims" on 18 September 2009 in respect of two blocks of land on Bunnerong Road, Matraville under subs 36(1) and (2) of the [Aboriginal Land Rights Act 1983 \(NSW\)](#) (**the ALR Act**) which were refused by the

Minister Administering the Crown Lands Act (**the Minister**) on 20 May 2010 on the ground that the land claimed was “not claimable Crown land within the meaning of the ALR Act as it comprises freehold land which is not vested in Her Majesty”. At the time of the claim, the land was vested in the State of New South Wales with the Register amended on 1 February 2011 to show Land Commission of NSW as owner, being a change effected by a “Conversion Project Team Leader” as part of a “Conversion Project” to convert all land records to an electronically administered system.

Issues:

- (1) whether the Conversion Project Team Leader had the requisite authority to alter the Register and whether the change made had ongoing validity;
- (2) whether the applicant has a right accrued from a recording in the Register before the amendment and whether such amendment causes the claimed land to be taken to have been vested in the Land Commission of NSW as of the date of claim; and
- (3) whether the claimed land was vested in Her Majesty.

Held: appeal upheld:

- (1) the “Conversion Project team leader” did not have the requisite authority to alter the Register (at [185(a)] and [127]) but s 42(1) of the [Real Property Act 1990 \(NSW\)](#) (**the RP Act**) applies to the recording of the Land Commission of NSW as registered proprietor of the claimed land irrespective of the recording not being lawfully made: at [185(b)] and [143];
- (2) that s 12(3)(c) of the RP Act is not a retrospective deeming provision such that the recording of the Land Commission of NSW as owner cannot be applicable at the date of claim (at [185(c)]) with the applicant’s rights protected by s12(3)(b) of the RP Act as from the date of claim: at [185(d)] and [184]; and
- (3) the land was “vested in Her Majesty” as at 18 September 2009 and so is “claimable Crown land” for the purposes of s 36(1) of the ALR Act and was ordered to be transferred to the La Perouse Local Aboriginal Land Council in fee simple within three months: at [186(2) and (3)].

- Valuation/Rating

New South Wales Cremation Company Pty Ltd v Valuer General [\[2016\] NSWLEC 135](#) (Robson J)

Facts: New South Wales Cremation Company Pty Ltd (**the applicant**) leases and operates the 9.045-hectare Rookwood Memorial Gardens and Crematorium within the grounds of the 283 hectare Rookwood Necropolis, approximately 15 kilometres west of the Sydney CBD, on an annual rental of 10% of the unimproved value of the land at 1 July on specified assumptions under the *Rookwood Necropolis Act 1901* (now repealed). The Valuer General (**the first respondent**) determined the unimproved value of the land at 1 July 2015 at \$10,600,000 and the Minister for Lands and Water (**the second respondent**) contended value to be between \$17,185,500 and \$17,800,000 to which the applicant objected and sought a determination of value at \$1,000,000. The differences in assessment of value were attributable to different primary methods of valuation and differing relevant comparable sales evidence adopted by the valuers for the applicant and the respondent, with the parties also differing on whether the Memorial Gardens were improvements for the purposes of the relevant definition of unimproved land value.

Issues:

- (1) whether the residual land value approach or the comparable sales approach to valuation was the appropriate primary method of valuation;
- (2) whether sales of industrial land and cemetery land were relevant comparable sales in the absence of sales of crematoria land; and
- (3) whether the ashes interred and scattered in the Memorial Gardens and the structures, gardens and plaques contained in the Memorial Gardens should be considered improvements for the purposes of the [Rookwood Necropolis Act 1901 \(NSW\)](#) (now repealed).

Held: appeal dismissed:

- (1) scattered ashes and interred ashes should not be considered an improvement as they neither increase the value of the land nor ameliorate it: at [64], [66] and [77], while structures, gardens and plaques which contain or mask interred ashes are improvements if they ameliorate the subject land compared with its natural state: at [72] and [77];
- (2) consistent with previous authorities, the comparable sales approach to valuation is to be preferred where comparable sales are available: at [89], [95] and [96];
- (3) sales of industrial land are of little assistance (at [109] and [114]) and sales of cemetery land are sufficiently comparable: at [108]; and
- (4) the unimproved land value of the Rookwood Memorial Gardens and Crematorium at 1 July 2015 was assessed as \$11,750,000 which is greater than the assessment of the Valuer General: at [140] and [141].

- Section 56A Appeals

Bellenger v Randwick City Council [\[2017\] NSWLEC 1](#) (Preston CJ)

Facts: Mr and Mrs Bellenger made a development application to Randwick City Council to demolish part of the front veranda and masonry fence of their semidetached dwelling and construct a hardstand car space in the front setback area. The development application was refused by Randwick City Council and Mr and Mrs Bellenger's subsequent appeal was dismissed by a Commissioner of the Court, Hussey AC.

Mr and Mrs Bellenger (**the appellants**) appealed against the Commissioner's decision under s 56A of the [Land and Environment Court Act 1979 \(NSW\)](#), raising 18 grounds of appeal that contended the Commissioner erred on a question of law.

Issues:

- (1) whether the Commissioner failed to have regard to the mandatory relevant considerations of s 79C(3A)(b) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) and cl 2.3 of the [Randwick Comprehensive Development Control Plan 2013](#) (**the RCDCP**);
- (2) whether the Commissioner made findings without evidence;
- (3) whether the Commissioner made irrational findings;
- (4) whether the Commissioner misconstrued a zone objective;
- (5) whether the Commissioner considered irrelevant matters;
- (6) whether the Commissioner failed to give adequate reasons for a finding; and
- (7) whether the Commissioner denied procedural fairness through failing to have regard to the appellants' submissions on relevant considerations (see (1) above).

Held: appeal dismissed with costs:

- (1) the appellants did not establish that the Commissioner failed to consider s 79C(3A)(b) of the EP&A Act or cl 2.3 of the RCDCP. The Commissioner addressed the substance of both mandatory relevant considerations: at [32], [63], and [64];
- (2) the appellants did not establish that the Commissioner made findings without evidence: there was evidence that cl 6.7(ii) of RCDCP had been consistently applied: at [47];
- (3) the finding that there would be a noticeable marking indicating 'small car parking only' was misread by the applicants and it was an assumption, not a finding of fact, which was reasonable on the evidence: at [80];
- (4) there was evidence that many of the hardstand car spaces relied on by the appellants had never been approved: at [86]. The appellants misread the Council Assessment report and there was evidence that Randwick Council had not approved any undersized car spaces: at [101]. The appellants' misread the Commissioner's reasons for judgment in their argument that that off-street parking was not possible: at [121];

- (5) the appellants did not establish that the Commissioner made irrational findings: the Commissioner's finding that a car space length of less than 5m was an unreasonable expectation of the subject site was not illogical or irrational and the appellants' misread the Commissioner's reasoning: at [51];
- (6) there was nothing irrational or illogical in the Commissioner's reasoning that a condition limiting car space to small cars would be unreasonable and the appellant's misread the Commissioner's reasoning: at [108], [109], [112];
- (7) there was logic to the Commissioner's finding that there would be a loss of public interest benefit if the development were to proceed: at [147];
- (8) the Commissioner did not misconstrue cl 2.3(2) of the R2 Low Density Residential Zone. Implicit in his finding that the proposed hardstand car space would not be a desirable element in the streetscape was the recognition that the existing front setback, without any hardstand, was a desirable element of the existing streetscape: at [75];
- (9) the appellants did not establish that the Commissioner considered irrelevant matters. The matter of setting an unacceptable precedent was not irrelevant: at [133];
- (10) the Commissioner did not hold as a matter of law that a development must have a positive public interest outcome to be approved, rather he made a simple finding of fact that the loss of an existing on-street car parking space would not be a positive public interest outcome. This was not an irrelevant matter: at [141];
- (11) the appellants did not establish that the Commissioner's reasons on the issue of pedestrian safety caused by vehicles parking over the footpath were so inadequate as to involve an error of law: at [172]; and
- (12) the appellants did not establish that the Commissioner failed to consider the mandatory relevant considerations (see (1) above) and accordingly the appellants did not establish that the Commissioner denied procedural fairness: at [40], [68].

Council of the City of Sydney v NFF at 410 Pitt Street Pty Ltd [\[2016\] NSWLEC 149](#) (Pain J)

(related decisions: ***NFF at 410 Pitt Street Pty Ltd v Council of the City of Sydney*** [\[2016\] NSWLEC 1181](#) (O'Neill C))

Facts: this was an appeal under s 56A of the [Land and Environment Court Act 1979 \(NSW\)](#) against a decision of a Commissioner (***NFF at 410 Pitt Street Pty Ltd v Council of the City of Sydney*** [\[2016\] NSWLEC 1181](#)) to approve a Stage 1 building envelope for a hotel development. The respondent's development application sought approval for the demolition of the existing six-level building on the subject site (410 Pitt Street, Haymarket) and construction of a 31-level, 178-room hotel with a ground floor café. The subject site is narrow with a front boundary of 6.445 metres. The surrounding area is characterised by a mix of commercial and residential buildings, with buildings ranging in height from two to 35 levels. The proposed development would abut its neighbours until a height of RL60.479, approximately 14 levels. The setback from the southern façade of the adjoining Miramar building to the north was approximately 1.2 metres. The grounds of appeal all relate to the Commissioner's approach to cl 6.16 of the Sydney Local Environmental Plan 2012 (**the SLEP**), which provides for the erection of tall buildings (greater than 55 metres) in Central Sydney.

Issues:

- (1) whether the Commissioner erred in her characterisation of the proposed development as a "freestanding tower" for the purpose of cl 6.16(3)(a) of the SLEP;
- (2) whether the Commissioner failed to take into account a mandatory relevant consideration, namely that the amenity and privacy of the occupants of the adjoining residence would be significantly affected by the proposed development (cl 6.16(3)(b));
- (3) whether the Commissioner failed to give adequate reasons for her finding on the impact of the proposed development on the amenity and privacy of the occupants of the adjoining residence; and
- (4) whether, by giving "determinative weight" to an advisory note related to the 1991 modification approval for the neighbouring Miramar building, the Commissioner took into account an irrelevant consideration.

Held: appeal dismissed, applicant ordered to pay the respondent's costs:

- (1) the Commissioner did not err in her construction of cl 6.16 of the SLEP: at [40];
- (2) it was open to the Commissioner as a matter of fact to find that the proposed development consisted of a building that has a freestanding tower: at [32];
- (3) it is not necessary that the entirety of each face of a freestanding tower be viewable from a public place to satisfy the clause: at [34];
- (4) the Commissioner also did not err in her consideration of the objectives of cl 6.16: at [36]; nor by disregarding the legislative history of the clause: at [39];
- (5) the Commissioner expressly considered the requirement in cl 6.16(3)(b) and concluded that there would not be a significant adverse impact on the amenity or privacy of the occupants of neighbouring buildings: at [54];
- (6) the Commissioner gave adequate reasons for her finding on the requirement in cl 6.16(3)(b): at [54]; and
- (7) the advisory note was a relevant consideration as it informed the level of amenity, views, outlook and light in the Miramar buildings that was previously considered by the Council to be acceptable. The Commissioner was entitled to consider the previous approval of the Miramar building in her assessment of the amenity impacts associated with the proposed development: at [60]-[61].

Luxe Manly Pty Limited v Northern Beaches Council [2016] NSWLEC 156 (Sheahan J)

(related decisions: ***Luxe Manly Pty Limited v Manly Council*** [2016] NSWLEC 1167 (Pearson C))

Facts: the applicant, Luxe Manly Pty Limited, appealed under [s 56A](#) of the [Land and Environment Court Act 1979](#) against a decision of a Commissioner, who dismissed the applicant's class 1 appeal in *Luxe Manly Pty Limited v Manly Council* [2016] NSWLEC 1167.

The development application the subject of that appeal proposed the consolidation of three lots, the demolition of existing buildings, and the construction of two residential flat buildings, on a site located at Manly. That proposal underwent a number of iterations. In its final form, one of the two proposed buildings breached a 13 m height development standard prescribed under [cl 4.3](#) of the [Manly Local Environment Plan 2013](#) and the applicant requested, under [cl 4.6](#), a variation in the standard. The Commissioner concluded that the requested [cl 4.6](#) variation "was not well-founded" and dismissed the request, and the appeal, and dealt with the applicant's "amber light" request in the following terms (at [53]): *"The applicant submitted that it would invite an amber light approach if that were the conclusion reached. Having regard to drawing DA08, any adjustment to the setback would have implications for the only source of light and outlook for bedroom 2; and such a fundamental re-design would not in my view be appropriately managed in that manner"*.

Issues:

- (1) whether the Commissioner's finding that a re-design of the uppermost floor of the eastern building to increase the setback around the wall to bedroom 2 would be a "fundamental redesign" was a finding without any, or any proper evidentiary basis;
- (2) whether an error of law infected the Commissioner's exercise of discretion regarding an "amber light" approach, which would permit an amendment to increase the setback on the upper level of the eastern building by one metre; and
- (3) whether the Commissioner erred in law by failing to afford procedural fairness to the applicant by not providing any opportunity to make submissions, or lead evidence, about the conclusion she reached in her judgment: at [53].

Held: dismissing the appeal:

- (1) the reasons of Commissioners should not be examined with the myopic focus that may accompany analysis of the reasons of a judge. Rather, emphasis should be on determining the essential reasons for a decision: [58];

- (2) the Commissioner gave detailed reasons for her conclusion. Her decision was not made without evidence, nor was her decision “manifestly unreasonable”, irrational or illogical. It was open to her on the basis of DA08, and she formed a conclusion that was available to her on the basis of that evidence: [62];
- (3) there are statutory provisions which inform the exercise of discretion, but none which mandate or forbid the “amber light” approach: [67];
- (4) there is an established common law duty to afford procedural fairness when a decision is made that may affect rights or interests. Procedural fairness requires a fair hearing, and the absence of bias. It requires a decision-maker to inform a party of the case brought against it, and allow it a corresponding opportunity to be heard in regard to that. The extent of the obligation on the decision-maker is dependent on the relevant statutory framework, and on what is “fair” in the circumstances: [92]-[93]; and
- (5) there can be no expectation created by the Court’s occasional discretionary decisions to adopt the “amber light” approach. It is not a component of standard procedure, to be consistently followed, and remains a matter of flexibility and discretion, to be employed in appropriate cases: [95].

Tanious v Georges River Council [2016] NSWLEC 142 (Pepper J)

(related decisions: ***Tanious v Georges River Council*** [2016] NSWLEC 1330 (Morris C))

Facts: Mr Tanious kept three roosters, 30 chickens, one turkey rooster, one female turkey and between 130 and 150 Japanese quail on his property. The *Local Orders Policy – Keeping of Animals (the Policy)* provided that residents could keep a maximum of 50 birds except for poultry and domestic and guinea fowl, 10 poultry (domestic and guinea fowl), and five poultry (other than fowls).

On 18 January 2016 Hurstville Council (subsequently Georges River Council) (**the Council**), issued an order under s 124 of the *Local Government Act 1993 (the LG Act)* limiting the number of birds that Mr Tanious could keep on his property, namely, 10 birds and no roosters (**the order**). Mr Tanious appealed the order in Class 1 of the Court’s jurisdiction.

The Commissioner visited the site. It was not in dispute that there had been no complaints about the crowing of the roosters. The Commissioner partially upheld the appeal and amended the order to allow the keeping of 10 chickens and five other poultry, which included Japanese quail. However, the prohibition on the keeping of roosters remained on the basis that their crowing constituted “offensive noise” as defined in the *Dictionary* of the *Protection of the Environment Operations Act 1997 (the POEO Act)*. Mr Tanious appealed the decision.

Issues:

- (1) whether the Commissioner erred in admitting the evidence of the council’s witnesses on the grounds of bias;
- (2) whether the Commissioner erred in finding that the roosters kept on the property emitted “offensive noise” as defined under the POEO Act; and
- (3) whether Japanese quail were “poultry” for the purposes of the Policy.

Held: upholding the appeal:

- (1) the fact that a person is an employee of the council does not, without more, afford any substance to an allegation of bias: at [35];
- (2) the allegation of bias was not raised before the Commissioner and there was no evidence of bias before the Court: at [31]-[32];
- (3) the Commissioner was in error in accepting evidence as expert evidence where the council officer did not purport to give expert evidence and had not agreed to be bound by the Expert Code of Conduct. However, because this error was not material to the decision, it did not vitiate the decision: at [34];
- (4) the Commissioner erred in finding that the noise from the roosters constituted “offensive noise” as defined under the POEO Act. While observations made by the Commissioner during the site visit constitute evidence, there was no record of the Commissioner hearing the roosters crowing and there

was no other evidence before the Commissioner concerning the noise emitted by the roosters upon which such a finding of fact could be made: at [49]; and

(5) whether Japanese quail were “poultry” depended on their biological classification. This was a matter of expert evidence: [70]-[73].

- Separate Question

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act
[\[2016\] NSWLEC 157](#) (Pepper J)

Facts: land at 11-13 Wynella Street, Gulgong (**the land**) was subject to a reservation for a public purpose, namely, for future public requirements. In September 2008 the land was the subject of a valid notice of intention to sell Crown land pursuant to s 34(3) of the [Crown Lands Act 1989](#) (**the CL Act**). The notice was published in two newspapers but it did not refer to the reservation or its intended revocation (**the s 34 notice**). A s 90(2) notice was prepared but was never published.

Section 90(1) of the CL Act provides that the Minister may revoke a reservation by publication in the Gazette. Section 90(2) of the CL Act provides that such a notification may not be published in the Gazette “unless at least 14 days have elapsed after notice of intention to publish the notification has been published in a [local or state-wide] newspaper”.

A tender process for the land was conducted between November 2008 and January 2009. The successful tender was notified. On 3 April 2009 the contract of sale for the land was signed and a notice of revocation of the reservation was published in the Gazette pursuant to s 90(3) of the CL Act. On 14 April 2009 the New South Wales Aboriginal Land Council (**NSWALC**) lodged a land claim over the land.

On 29 July 2016 the Court granted leave to separately determine the following two questions:

As at 14 April 2009, was the land the subject of the application (being Lot 497 DP 824135):

- (1) able to be lawfully sold or leased under the [Crown Lands Consolidation Act 1913 \(NSW\)](#) or the [Crown Lands Act 1989 \(NSW\)](#); or
- (2) reserved or dedicated for any purpose under the [Crown Lands Consolidation Act 1913 \(NSW\)](#) or the [Crown Lands Act 1989 \(NSW\)](#).

Issues:

- (1) whether compliance with s 90(2) of the CL Act was an essential precondition to the Minister’s exercise of the power to revoke a reservation;
- (2) whether the s 34 notice did not satisfy s 90(2) of the CL Act;
- (3) whether non-compliance with s 90(2) invalidated the revocation of the reservation; and
- (4) whether the contract of sale was unenforceable.

Held: answering both questions affirmatively and finding that compliance with s 90(2) was essential and that the contract for sale was therefore invalid:

- (1) compliance with s 90(2) of the CL Act was an essential precondition to the exercise of the revocation power contained in s 90(1) of the CL Act: at [87];
- (2) the language in s 90(2) (“may not”) clearly qualified the discretionary power contained in s 90(1), and s 90(2) had no work to do if notification was not required: at [57] and [64];
- (3) this was in conformity with the object of the section which was to inform the public of an intention to revoke a reservation: at [71];
- (4) the s 34 notice was not sufficient to comply with s 90(2) of the CL Act: at [104];
- (5) the s 34 notice did not identify that the land was subject to a reservation nor did it provide notice of an intention to revoke the reservation. Further, it could not be assumed that a reasonable reader of that

notice had a sufficiently sophisticated understanding of the that he or she would understand that the sale of Crown land would require the revocation of any reservation the land was subject to: at [92];

- (6) an act done in breach of the obligation imposed by s 90(2) invalidated the revocation of the reservation: at [134];
- (7) because the reservation had not been validly revoked, the Minister's power to sell the land had not been properly engaged and the contract of sale was unlawfully entered into and was a nullity insofar as it was presently unable to be enforced by either party: at [136]; and
- (8) at the date of the claim by the NSWALC, the land remained reserved for a public purpose and was therefore capable of being "lawfully sold or leased". It was therefore "claimable Crown land" for the purposes of the [Aboriginal Land Rights Act 1983](#): at [135]-[137].

Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [\[2016\] NSWLEC 153](#) (Robson J)

Facts: the applicant, Principal Healthcare Finance Pty Ltd (**Principal Healthcare**), sought approval from the respondent, the Council of the City of Ryde (**the Council**) to develop a residential care facility for high care seniors in an area zoned R2 – Low Density Residential. This application was referred to the Sydney East Region Joint Regional Planning Panel (**the JRPP**), which refused the development application, in part because cl 26 of the [State Environmental Planning Policy \(Housing for Seniors and People with a Disability\) 2004](#) (**the SEPP (HSPD)**) prohibited it from granting consent.

On 8 June 2016, Pain J made an order in *Principal Healthcare Finance Pty Limited v Council of the City of Ryde* [\[2016\] NSWLEC 88](#) that the following question be heard separately:

Whether cl 26 of the [State Environmental Planning Policy \(Housing for Seniors and People with a Disability\) 2004](#) is a development standard amenable to cl 4.6 of the [Ryde Local Environmental Plan 2014](#) or a prohibition.

Issues:

- (1) whether cl 26 of [SEPP \(HSPD\)](#) is a development standard or a prohibition.

Held: clause 26 of [SEPP \(HSPD\)](#) is a development standard, and not a prohibition:

- (1) the correct approach to determining whether a provision of an environmental instrument is a development standard is to apply the two-step test of Giles JA in *Strathfield Municipal Council v Poynting* [\[2001\] NSWCA 270](#), applying the principles outlined by Jagot J in *Laurence Browning v Blue Mountains City Council* [\[2006\] NSWLEC 74](#) at [26] and Tobias JA in *Agostino v Penrith City Council* [\[2010\] NSWCA 20](#): at [45];
- (2) applying the first step:
 - (i) whilst cl 26 of [SEPP \(HSPD\)](#) states that "A consent authority must not consent", this is not determinative of whether it is a prohibition or development standard: at [48];
 - (ii) the criteria specified in cl 26 [SEPP \(HSPD\)](#) are not essential criteria, as the needs of seniors requiring different levels of care (and as such utilising different types of housing) would be different: at [49]-[51];
 - (iii) [SEPP \(HSPD\)](#) does not act to prohibit development generally, but rather seeks to allow development to occur where it would otherwise not be allowed: at [52]; and
 - (iv) clause 26 of [SEPP \(HSPD\)](#) therefore does not act to prohibit development: at [54],
- (3) applying the second step, cl 26 of [SEPP \(HSPD\)](#) falls within the definition of "development standards" in s 4 of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#), as it relates to empirical criteria that specifies requirements and fixes standards, and fits within three of the categories listed in the provision, and as such meets the second step: at [68]; and
- (4) the finding that cl 26 of [SEPP \(HSPD\)](#) is a development standard is consistent with similar findings of McClellan CJ of LEC in *Georgakis v North Sydney Council* [\[2004\] NSWLEC 123](#): at [75].

- Costs

Song v Hackney (No 2) [\[2016\] NSWLEC 155](#) (Sheahan J)

(related decisions: ***Song v Hackney*** [\[2016\] NSWLEC 1512](#) (Fakes AC))

Facts: the respondent to these Class 2 proceedings, Ms Hackney, sought a costs order in her favour following dismissal of her neighbour's application by Fakes AC on 2 November 2016 in *Song v Hackney* [\[2016\] NSWLEC 1512](#).

Ms Song (**the applicant**) had applied under Pt 2 s 7 of the [Trees \(Disputes Between Neighbours\) Act 2006](#) for orders seeking the removal of two Liquidambar trees and the payment of \$63,729.20 for losses arising from, or incidental to, damage to her property allegedly caused by the trees. The damage was said to be damage to the applicant's sewer pipes. The applicant was also concerned about the possibility of future damage to her pipes from tree roots. After consideration of the evidence, Fakes AC concluded that, as a relevant tree, referred to as Tree 2, had been removed and the roots poisoned, it could not cause any future damage to the applicant's sewer. Further, although another relevant tree, referred to as Tree 1, remained on the site and was close to the sewer main, the applicant's sewer was new and had been diverted away from it. Assuming that the sewer was installed to industry standards, and on the basis of the warranty provided by the plumber, there was said to be no reason why the roots from the tree would, in the period of 12 months considered by the Court to be the "near future" (see *Robson v Leischke* [\[2008\] NSWLEC 152](#) at [200]), cause damage to the applicant's sewer. Therefore, there was insufficient reason to order the removal of that tree on the basis of a hypothetical possibility that future damage may occur. Fakes AC also concluded that there was insufficient evidence to require the respondent to make any contribution to the replacement of the remaining section of sewer/waste water pipe.

The respondent then sought orders, including that the applicant pay the respondent's costs in the proceedings of the motion.

Issues:

- (1) whether the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances, pursuant to [r 3.7](#) of the [Land and Environment Court Rules 2007](#).

Held: dismissing the costs application:

- (1) the applicant's conduct was not so "unreasonable" that it should displace the presumption that no order for costs should be made in proceedings such as these: [25];
- (2) the applicant was entitled to take action on her concerns, and the fact that she failed in the proceedings, after maintaining her position, is not a sufficient basis for an order for costs against her: [26];
- (3) the fact that the applicant stated at the hearing that she was not informed of downstream root incursions discovered in 2013, and a regrettable level of rhetoric, conflict, unpleasantness or intransigence between neighbours were not the sorts of "disentitling" conduct which would be sufficient to negate the costs presumption: [27]-[28]; and
- (4) it was not unreasonable for the respondent to act on her expectation that the Court might consider her circumstances in the proceedings to be so exceptional that she might achieve an order for costs, and her claim for costs was certainly arguable. As such it was not appropriate that the costs of the notice of motion "follow the event" of its failure. Each party should pay its own costs of that argument: [31]-[32].

- Miscellaneous

Lateral Estate Pty Ltd v Council of the City of Sydney [\[2017\] NSWLEC 6](#) (Sheahan J)

Facts: this case involved a notice of motion brought by the respondent Council to summarily dismiss the applicant's Class 1 appeal on the basis that it was "out of time". The Council relied upon r 13.4 of the Uniform Civil Procedure Rules 2005.

The Class 1 appeal made to the Court by Lateral Estate Pty Ltd (**the applicant**) sought an order to be made to determine a development application (**DA**) in respect of “integrated development” under s 91 of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**). The development proposal was classed as such due to the fact that approval was required under the [Water Management Act 2000](#) in addition to development consent in order for the development to be permissible.

Upon receiving the DA, Council did not issue a ‘stop the clock’ letter, which meant that the 60 days deemed refusal period applicable to the lodged DA would expire on 14 January 2015, and the time for a deemed refusal appeal to the Court would expire on 14 July 2015 (ss 82 and 97 of the EP&A Act). In its assessment report regarding the proposal, Council proposed conditions of approval including some terms of approval proposed by the Office of Water to be attached to any consent granted by Council.

On 1 March 2016, the applicant’s development manager emailed the Council’s Senior Planner a marked-up, amended version of the Council’s suggested conditions, which he described as “draft conditions incorporating staging”. After receiving a further email from the Development Manager regarding plans to make further changes to the Council’s proposed conditions, the Council’s Senior Planner replied that the Council would consider each mark-up closer to the time that it was ready to determine the DA. This email communication was sent on 13 April 2016.

On 11 November 2016, the applicant commenced its Class 1 proceedings to appeal against Council’s deemed refusal of the DA as allegedly amended on 13 April 2016. The applicant contended that the DA had been amended by way of the changes discussed in the email correspondence with Council, and, as a result, time had again commenced to run, with the appeal being filed within the resulting time limit, measured from the date of the amendment.

Issues:

- (1) the Court was required to determine whether the DA had been amended, in order to determine whether the Class 1 appeal was filed in time, in accordance with s 97 of the EP&A Act.

Held: the Court found that there was no amended DA, so the Class 1 appeal was filed out of time. The proceedings were dismissed.

- (1) the applicant proposed amendments not to its DA proposal, but to Council’s proposed conditions: at [85];
- (2) the particulars provided in the applicant’s email to Council were of changes suggested to proposed conditions, rather than changes to the applicant’s proposed development: at [86];
- (3) the applicant did not engage cl 113 of the [Environmental Planning and Assessment Regulation 2000](#): at [85];
- (4) the applicant’s submission that the Council email of 13 April 2016, indicating an intention to impose on any favourable determination the amended conditions meant that Council was agreeing to accept the amended DA, was rejected by the Court: at [91]; and
- (5) the applicant did not make it clear to Council in any way that it was seeking to amend the DA: at [86]. Although a specific form is not prescribed for amendments to a DA, it must be made clear to the consent authority that an amendment is being proposed: at [93].

Micheal Harold Connor v Smith Hire Service (Casino) Pty Ltd [\[2017\] NSWLEC 7](#) (Robson J)

Facts: in a notice of motion, the applicant sought orders that whole or part of the proceedings before the Land and Environment Court (LEC) be transferred to the Supreme Court pursuant to s149B(1) of the [Civil Procedure Act 2005 \(NSW\)](#) (CP Act). The proceedings related to a claim for relief under ss 123 and 124 of the [Environment Planning and Assessment Act 1979 \(NSW\)](#) (EP&A Act), as well as damages in tort. The dispute concerned neighbouring properties, with the applicant contending that a stockpile on the first respondent’s property was the operative cause of a landslip on the applicant’s property.

Issues:

- (1) whether the LEC has jurisdiction to hear claims in tort;
- (2) whether the tort claims fell within the ancillary jurisdiction of the LEC pursuant to s 16(1A) of the [Land and Environment Court Act 1979 \(NSW\)](#) (LEC Act);

- (3) whether part of proceedings can be transferred under s149B(1) of the CP Act;
- (4) whether the Supreme Court has jurisdiction to hear the claims under ss 123 and 124 of the EP&A Act; and
- (5) whether the Supreme Court is the “more appropriate” court.

Held: proceedings ordered to be transferred to the Supreme Court:

- (1) the LEC does not have jurisdiction to hear claims in tort simpliciter: at [6];
- (2) the tort claims do not fall within the ancillary jurisdiction of the LEC as they were not incidental to the claims under the EP&A Act, but rather, as claims in the alternative, had a separate or independent existence: at [8]-[9];
- (3) it is questionable whether s 149B of the CP Act allows for the transfer of part only of proceedings: at [16];
- (4) in the interests of the just, quick and cheap resolution of proceedings, it was preferable that claims within the same proceedings not be split: at [16];
- (5) section 149E of the CP Act allowed the LEC to transfer its exclusive jurisdiction over claims under ss 123 and 124 of the EP&A Act to the Supreme Court: at [17]; and
- (6) the Supreme Court was therefore the “more appropriate” court in the context of these proceedings: at [17].

North Sydney Council v Minister for Local Government [\[2016\] NSWLEC 161](#) (Robson J)

Facts: in April 2016, the NSW Government determined that a number of Councils across New South Wales would be amalgamated. As a result, the applicant, North Sydney Council brought proceedings against a number of respondents, including the Minister for Local Government (**the Minister**), seeking that its proposed amalgamation with Willoughby City Council and Mosman Municipal Council (**the Councils**) be voided. Moore J found in favour of North Sydney Council on 20 September 2016 in *Hunter’s Hill Council v Minister for Local Government* [\[2016\] NSWLEC 124](#), as the delegate of the Minister had failed to prepare a report that satisfied the requirements of s 263(3) of the [Local Government Act 1993 \(NSW\)](#). North Sydney Council has appealed this decision.

Subsequent to the decision of Moore J, on 30 September 2016, the Minister’s delegate prepared a further report which purportedly met the statutory requirements. North Sydney Council brought the present proceedings against the Minister and his delegate seeking declaratory and consequential relief stating that the revised report is similarly not a valid report. Alternatively, it claimed that it was denied procedural fairness, as it was not permitted to make submissions regarding the preparation of the report.

The Minister filed a motion that the matter be expedited. North Sydney Council opposed the application for expedition, as if it were to be successful in the Court of Appeal in the earlier proceedings, these proceedings would be rendered otiose. Mosman Municipal Council opposed the application as it intended to initiate appeal proceedings, which it intended would run together with the North Sydney Council appeal.

Issues:

- (1) whether the proceedings should be expedited.

Held: the proceedings should be expedited:

- (1) the considerations for determining whether expedition should be granted were correctly summarised by Young J in *Greetings Oxford Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33 at 42-43: at [18];
- (2) as the costs and public inconvenience of cancelling elections for the new Council should be avoided where possible, the proceedings should be expedited: at [30];
- (3) the concern of North Sydney Council that these proceedings may be rendered otiose was effectively dealt with when the Minister undertook to pay its costs thrown away if the present proceedings were rendered otiose by the Court of Appeal proceedings: at [31];

- (4) any impact on the Court's resources were outweighed by the benefits of expediting the proceedings: at [32]; and
- (5) there was insufficient evidence to suggest that any burden placed on Mosman Municipal Council would outweigh the benefits of expediting the proceedings: at [33].

Reysson Pty Ltd v Roads and Maritime Services (No 4) [2016] NSWLEC 159 (Preston CJ)

(related decisions: **Reysson Pty Ltd v Roads and Maritime Services (No 3)** [2016] NSWLEC 69 (Craig J))

Facts: the Roads and Maritime Services (**the respondent**) compulsorily acquired land at Banora Point owned by Reysson Pty Ltd (**the applicant**). The applicant objected to the amount of compensation offered for the acquisition and commenced proceedings under s 66 of the [Land Acquisition \(Just Terms Compensation\) Act 1991](#). The Judge allocated to hear and dispose of the proceedings, Craig J, reserved judgment on 10 May 2013. Pursuant to s 44(1) of the [Judicial Officers Act 1986](#), Judges of the Court cannot complete any matters relating to any proceedings that they have heard once they reach 72 years of age. As Craig J's 72nd birthday was on Monday 6 June 2016, the last date for Craig J to deliver judgment in the proceedings was Sunday 5 June 2016 (by midnight). On Thursday 2 June 2016, Craig J listed the matter for judgment at 4.30 pm on Sunday 5 June 2016, to be delivered by telephone. By Friday 3 June 2016, Craig J's associate had directly notified the parties' solicitors, by telephone, of the listing. At about 4.30 pm on Sunday 5 June 2016, Craig J pronounced his judgment and orders to the parties' solicitors over the telephone from a courtroom at the Land and Environment Court. Craig J ordered that the appropriate amount of compensation for the compulsory acquisition was \$6,212,369 (**the compensation order**) and reserved the decision of the costs of the proceedings. Craig J's written reasons for judgment were certified and signed by his associate and dated 5 June 2016. The reasons for judgment were published on the [New South Wales Caselaw](#) website. The applicant was dissatisfied with the judgment and compensation order and sought, by notice of motion, for the Court to correct alleged errors of fact made by Craig J in deriving the market value of the acquired land from a comparable sale of other land. In particular, the applicant sought to set aside or vary the compensation order made by Craig J, so as to increase the amount of compensation.

Issues:

- (1) whether the alleged factual errors made in Craig J's determination of the amount of compensation could and should be corrected under the slip rule, r 36.17 of the *Uniform Civil Procedure Rules 2005 (UCPR)*;
- (2) whether the judgment or compensation order should be set aside under UCPR r 36.15 on the basis that the judgment was given, and that the orders were made, irregularly. In particular, whether the delivery of judgment on a Sunday at 4.30pm by telephone to the parties, rather than in open court with the parties physically present, contravened s 62 of the [Land and Environment Court Act 1979 \(the Court Act\)](#) and was, therefore, irregular;
- (3) whether the judgment or compensation order should be set aside under UCPR r 36.16(1) because the orders that were entered were void or because of the irregularity in the way in which judgment was given and the orders were made;
- (4) whether the judgment or compensation order should be set aside or varied under UCPR r 36.16(2)(b) because the judgment and compensation order were made in the absence of the parties; and
- (5) whether costs of the notice of motion should be awarded to the respondent.

Held: notice of motion dismissed; respondent to pay the applicant's costs of the proceedings, other than the costs of the applicant's motion:

- (1) the applicant did not establish that there was any error arising from an accidental slip or omission in Craig J's findings that the range of value for the acquired land was \$80 per square metre to \$100 per square metre or that the rate of \$85 per square metre was appropriate to be applied when determining the value of the acquired land: at [52];
- (2) Craig J's findings were deliberate, based on the evidence of the respondent's valuation expert, and accorded with the Judge's intention: at [41]-[47] and [52];

- (3) even if there were to have been an error, the slip rule (UCPR r 36.17) would not have been appropriate to correct the alleged errors. Correcting the alleged errors would necessarily involve evaluative or discretionary judgments, such as selecting the precise rate within the “corrected” range of value of the acquired land: at [53];
- (4) the applicant did not establish that Craig J’s judgment was given in contravention of s 62 of the Court Act and, therefore, irregularly under UCPR r 36.15: at [77] and [91];
- (5) although s 62 of the Court Act should be read to require that judgment be given in open court, it provides the statutory authority for the Court to order that a judgment be given otherwise than in open court: at [78]-[79];
- (6) Craig J’s order fixing the date, time and mode of giving judgment was an order under s 62 of the Court Act to give judgment otherwise than in open court: at [80]-[81];
- (7) the giving of judgment by Craig J on Sunday 5 June at 4.30pm was authorised by s 71 of the [Civil Procedure Act 2005](#) (the CP Act) and UCPR r 36.3(1): at [82]-[85];
- (8) section 71 of the CP Act should not be read to cause s 62 of the Court Act to prevail over s 71 of the CP Act and the uniform rules incorporated by s 71(g), including UCPR r 36.3: at [86];
- (9) section 71 of the CP Act and s 62 of the Court Act are not inconsistent: at [87];
- (10) UCPR r 36.3 authorised Craig J to give judgment in the absence of the public in the manner that he did on Sunday 5 June 2016: at [89];
- (11) UCPR r 36.3 did not impermissibly extend the jurisdiction of the Court contrary to s 5(2) of the CP Act: at [90];
- (12) even if Craig J’s judgment were to have been given irregularly, the applicant did not show sufficient cause to warrant exercising the discretion to set aside the judgment or compensation order under UCPR r 36.15(1): at [92];
- (13) first, the applicant waived or acquiesced in Craig J delivering judgment otherwise than in open court: at [93];
- (14) second, the applicant did not establish that Craig J made any error in determining the market value of the acquired land: at [95];
- (15) third, the applicant did not establish that any irregularity by not giving judgment in open court was causally related to any error in the judgment: at [96];
- (16) fourth, given the necessity for the Court to make evaluative judgments to correct any error, a rehearing would be required, which would entail unacceptable costs, delay, inconvenience and uncertainty: at [97]-[102];
- (17) the alleged irregularity in the manner in which Craig J gave judgment did not make the orders he made void and, therefore, liable to being set aside under UCPR r 36.16(1): at [105]-[106];
- (18) Craig J’s judgment was not given in the absence of the parties and, therefore, his judgment and compensation order could not be set aside or varied under UCPR r 36.16(2)(b): at [116];
- (19) even if the parties were absent, the applicant waived its entitlement to be physically present and the relevant discretionary factors would make it inappropriate to set aside or vary the compensation order under UCPR r 36.16(2)(b): at [92]-[101] and [116];
- (20) the appropriate exercise of the discretion under s 98 of the CP Act was to make no order as to the costs of the applicant’s motion: at [126]; and
- (21) the applicant’s conduct in bringing and arguing the motion was not unreasonable and the statutory provisions concerning the Court giving judgment and making orders in open court, or in the absence of the public, had not been the subject of previous judicial decision: at [126].

- Commissioner decisions

Lightning Ridge Miners' Association Limited v Hall; Lightning Ridge Miners' Association Limited v Hall; O'Brien v Newton [2016] NSWLEC 1636 (Dixon C)

(related decisions: *O'Brien v Slack-Smith; O'Brien v Hall; O'Brien v Hall* [2015] NSWLEC 1179 (Dixon C); *O'Brien v Slack-Smith (No2); O'Brien v Hall (No2); O'Brien v Hall (No2)* [2015] NSWLEC 1271 (Dixon C); *Hall v O'Brien* [2015] NSWLEC 200 (Preston CJ))

Facts: this was the remitter of proceedings following the decision of the Chief Judge noted above. The remitted issues concerned whether an Access Management Plan (**AMP**) for small-scale titles (SST) holders made pursuant to Pt 10A of the *Mining Act (the Mining Act)* should include a requirement under s 236D that SST holders maintain: public liability insurance; vehicle registration and that miners' hours of access to their title extend beyond sunrise and sunset in Lightning Ridge.

Issues:

- (1) whether SST holders must maintain public liability insurance with respect to their activities on access routes created by an AMP made pursuant to the Mining Act: at [49].
- (2) whether SST holders must maintain registration and compulsory insurance of motor vehicles driven or operated by or on their behalf on access routes created by an AMP: at [167];
- (3) whether motor vehicles driven or operated by or on behalf of SST holders on access routes created by an AMP must only be driven or operated by persons holding licenses entitling them to drive or operate those vehicles or class of vehicles at [167]; and
- (4) whether the hours of access prescribed by cl 45(8)(c) of the Regulations made pursuant to the Mining Act (Regulation 45(8) (c)) should be varied.

Held: directing preparation by the parties of an AMP in accordance with the decision:

- (1) the holders of SSTs pursuant to Pt 10A of the Mining Act are not required to maintain public liability insurance with respect to their activities on access roads created by an AMP made pursuant to the Act: at [166];
- (2) the evidence was that SST holders have taken reasonable steps to date to prevent foreseeable harm to the defendants and their property whilst crossing or using access roads to their title. There was no evidence of any problem of recovering loss or damage from SST holders on access roads because there is no reported incident: at [157]-[165];
- (3) the evidence at the time of the hearing was that SST holders could not find such insurance: at [163];
- (4) accepting that the AMP manages access for both parties who have competing interests but legitimate rights to use the land based on the evidence there was no reasonable justification at the time of the hearing to require for the purposes of access such insurance as a requirement of the AMP: at [166];
- (5) on the evidence the safety of persons and /or stock or environmental protection: s 236D(1)(b)(ii) and (iv) is not dependant or improved by the requirement of registration of vehicles and licencing of drivers on access tracks on private land;
- (6) the manner of identification of vehicles as provide in the determined AMPs adequately provides the landowners with sufficient identification information about vehicles (registered and unregistered) coming onto their land on access tracks: at [195];
- (7) the defendants were unable to adduce any admissible evidence of any significant accidents or of their reporting resulting from unregistered vehicles or machinery on access roads therefore the Court declined to exercise its discretion to impose the registration and insurance restrictions proposed by the defendants: at [194]-[197];
- (8) the defendants' fears concerns about the safety of persons and cattle and property at dusk and dawn when SST holders might be accessing their titles on an access route were simply not made out on the evidence: at [206]; and

- (9) the plaintiff's case for flexible access hours was supported by the fact that restricting hours of access restricts the miners ability to prospect in the most favourable working hours in temperature which in summer exceed 40 degrees: at [202].

Mina Suh v Liverpool City Council and Casula Community Group for Responsible Planning Inc [2016] NSWLEC 1596 (O'Neill C)

Facts: the applicants appealed under s 97(1) of the *Environmental Planning and Assessment Act 1979* (the **EP&A Act**) against the refusal by Liverpool City Council to grant consent for the demolition of the existing 'Fontainebleau Motor Inn' and construction of a single storey hotel for 500 patrons and associated at grade car parking for 161 cars at Casula. The site is zoned B6 - Enterprise Corridor and a commercial premises is permissible in the zone.

Issues:

- (1) whether the proposal would have unacceptable adverse social impacts within the locality.

Held: dismissing the appeal and refusing development consent:

- (1) the locality was a 1km radius around the site, including the residential areas within the 1km radius to the north of the M5 Freeway, because there is less than a half hour walk from any location within the locality to the site and as the Hume Highway crosses over the M5 Freeway, the Hume Highway provides connectivity from the residential areas to the north of the M5 Freeway to the site: at [41];
- (2) the fact that the Australian Bureau of Statistics (ABS) Socio-Economic Indexes for Areas (**SEIFA indices**) established that the locality is consistently more disadvantaged and significantly more disadvantaged than the Greater Sydney average was accepted: at [45];
- (3) the agreed evidence of the social planning experts that the literature has established a correlation between social disadvantage and increased vulnerability to alcohol related harm was accepted: at [45];
- (4) the existing "hot spot" for domestic violence which included the site was a persuasive reason to be concerned about introducing a hotel onto the site where there is currently no liquor outlet: at [84];
- (5) the proposal was likely to have a significant impact on the amenity of the aged-care residents in the aged-care facility on the adjoining site, despite the amelioration of those impacts to some extent by screening, planting and closing the Graham Ave vehicular exit from the proposal at 10pm each night: at [64];
- (6) as the B6 Enterprise Corridor zone permits with consent a very broad range of uses, the permissibility of the proposal was a neutral factor in determining the appeal: at [65];
- (7) the evidence that the Responsible Service of Alcohol (RSA) policy is not always effective in ensuring that patrons do not reach an undesirable level of intoxication, was accepted: at [72];
- (8) the identified adverse social impacts of the proposal were not adequately mitigated by the management and other strategies proposed: at [75];
- (9) there would have been significant disbenefits in introducing a hotel into a socially disadvantaged area with no hotel on the site, compared to the relative slight benefit of removing one hotel licence from a busy Liverpool CBD environment with 7 hotels: at [79];
- (10) there was no basis for considering the extent to which the development contributed to any cumulative loss of temporary housing in the local government area: at [81]; and
- (11) the concerns of the objectors were given significant weight and the issues raised by them were a relevant aspect of the public interest: at [88].

Nasser Hussein v Georges River Council [2016] NSWLEC 1548 (Smithson C)

Facts: this was an appeal against the refusal of an application for a mosque in a residential area of South Hurstville.

The application received substantial community opposition associated with the proposed hours of operation, number of worshippers, and parking. The mosque would be open for prayer from as early as 3.30 am to as late as 10.30 pm daily.

A three-level basement car park was proposed under the mosque to operate as a one way system with the lowest levels to be occupied first and an electronic system directing drivers where to park and advising when spaces were full, with a reversal of direction then required. This aspect of the development was of particular concern to the Council and the community who argued it would be inefficient and inadequate and result in worshippers parking in surrounding residential streets.

The Council questioned attendee limits, the satisfactory operation of the car park, and that amenity impacts could be managed. The parties agreed that compliance with a strict Plan of Management (**PoM**) would be essential to avoid adverse impacts. Key elements of the PoM included restricting hours and numbers, caretakers to supervise operations, and reliance on worshippers to comply with directions on behaviour.

Issues:

- (1) would the proposed operation and management of the mosque be adequate or enforceable to avoid adverse impacts on the residential neighbourhood in which it was situated.

Held: dismissing the appeal and refusing development consent:

- (1) the ability to operate the mosque without unreasonably adversely impacting neighbours could not be guaranteed: at [105];
- (2) the site was simply too small, too close to residential dwellings and therefore too constrained, to be able to satisfactorily operate for its intended purpose, both for future worshippers using it and those who reside near it: at [106];
- (3) the development was reliant on total enforcement of and compliance with the PoM not to have unreasonable impacts outside daylight hours. Although there may be low risk of breaches but there would be high consequences during core night time sleeping hours for surrounding residents: at [129];
- (4) the proposed PoM would place an unrealistic operational regime on the mosque further calling into doubt its ongoing implementation. For example, it directed where dawn worshippers could park and required volunteers to oversee the car park operation and patrol the streets. Requiring such measures was symptomatic of the fact that the development was not appropriate in the location proposed: at [108] and [130]; and
- (5) there was nothing the applicant could reasonably do which would make the proposed development approvable in terms of reasonable impacts on its neighbours and still enable the mosque to operate as would be intended for its worshippers: at [137].

Newland Developers Pty Ltd v Tweed Shire Council [\[2017\] NSWLEC 1021](#) (Morris C)

Facts: the first stages (Stages 1 to 14) of the Seabreeze Estate were completed under Development Consent No K99/1837 and comprised around 500 lots. On 2 June 2013, Tweed Shire Council (**the Council**) issued Development Consent No. DA13/0577 for an 88-lot subdivision – being Stages 15 to 18.

Under that approval Stage 18 comprised a Master Lot, being the subject site. Stages 15 to 17 are currently being developed with housing. That master lot has been identified under the council's planning controls as a potential school site.

The applicant lodged a development application with the Council on 3 June 2015 seeking consent to subdivide land in Stage 18 and known as Lot 1147 DP 1115395 into 65 lots over two stages. The application was subsequently amended to rely on amended plans. The amended plans now proposed the subdivision of the land into a total of 66 allotments over two stages, stages 18A and 18B. Two lots would be dedicated to the Council as public reserves (Lots 1814 and 1866) and one as a drainage reserve (Lot 1826), leaving a total of 63 residential allotments.

The Council had formally refused consent and Newland appealed that determination pursuant to the provisions of s 97(1) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).

Issues:

- (1) whether the proposal is inconsistent with the identification of the property as a potential school site in the Council's Development Control Plan (**the DCP**); and
- (2) whether approval of the application would be in the public interest.

Held: dismissing the appeal and refusing development consent:

- (1) on the evidence provided, there will be a need for another school to service the needs of the locality: at [70];
- (2) the strategic planning for the Tweed Coast had been well documented and this had long identified a need for a school site in Pottsville and the Council had incorporated such provision within its DCP since 2000: at [72];
- (3) section 74BA of the EP&A Act sets out the purpose and status of development control plans and the Council used its DCP to achieve the aims of its LEP. The DCP had, according nominated the site as a potential school site since 1999. The designation has been considered on a number of occasions since - with the Council's most recent resolution being to retain that designation with a review no earlier than 2018: at [73] and [74];
- (4) section 79C(3A)(b) requires a consent authority to apply standards flexibly with respect to an aspect of the development and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development. Whilst the DCP does not set standards, it does, in Pt B21 s 3.5, contemplate that the site may not be required for a school and sets criteria to be satisfied if an alternate use is to be made of the land: at [77];
- (5) the criteria set out in the DCP were not met to show subdivision of the site as proposed represented a better outcome than the provision of a school or that subdivision would be in the public interest: at [82];
- (6) no evidence of whether final interest in the property for the purpose of the school had been exhausted was available: at [84];
- (7) having regard to the Council's strategic planning and the consistent application of its controls, approval of the application would not achieve the objectives of the LEP or the R2 zone objective of providing other land uses facilities or services to meet the day to day needs of residents, acknowledging that, although the subdivision would provide for the housing needs of the community in a low density environment, it would not be in the public interest: at [87]; and
- (8) no evidence on whether only part of the site could be developed for the purpose of a school had been provided: at [88].

Orion Consulting Engineers Pty Ltd v Blacktown City Council [2017] NSWLEC 1017 (Martin SC)

Facts: the applicant appealed under s 97AA of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) against a deemed refusal of the Council to amend a conditional development consent issued to the applicant. The consent related to a significant undertaking, comprising subdivision of land into 143 residential lots, 10 residue lots, associated earthworks, associated subdivision works, construction of new roads, demolition of existing structures, tree removal and site remediation. The relevant condition required the applicant to obtain a registered easement prior to the issue of a *construction* certificate. The applicant sought to amend the timing, such that the requirement for the easement be shifted to a time prior the issue of a subdivision certificate.

The applicant was unable to secure the agreement to the easement from the owners of the impacted land (the servient tenement). The owners, tenants-in-common, were estranged, and the whereabouts of one of them was unknown. Further, any delay in commencing works would result in significant financial hardship for the applicant.

Council was concerned about the lack of certainty of an easement being obtained, and contested that the applicant had a common law right to drain over the land. The orderly and economic use and development of the land required the easement to be registered before works commenced.

Issues:

- (1) whether the registration of the drainage easement should be required prior to the issue of a construction certificate, or prior to the issue of a subdivision certificate.

Held: dismissing the appeal:

- (1) a registered easement was required be obtained prior to the issue of a construction certificate: at [6], [54] and [55];
- (2) in this case, there was no common law right for discharge of surface waters to occur without an easement: at [7] and [69]-[77];
- (3) financial hardship faced by the applicant as a result of the difficulty in obtaining an easement was a relevant consideration for the Court: at [78]-[85]; and
- (4) the economic considerations did not outweigh the hardship which would be caused to a non-party to the proceedings, namely the owners of the impacted land: at [86] and [87].

Court News

Arrivals/Departures

Justice Rachel Pepper has taken leave from the Court for the period January 2017 to January 2018 to chair an inquiry commissioned by the Northern Territory Government into hydraulic fracturing for the recovery of hydrocarbons.

Acting Justice Simon Molesworth AO QC has been appointed as an Acting Judge of the Court, commencing on 23 January 2017 until 31 December 2017 to replace Justice Pepper.

Ms Edwina Chapman, Associate to the Chief Judge, having qualified and been admitted to practise as a solicitor, has resigned effective 24 February 2017 to enter private practice.

Registrar Joanne Gray has been appointed as a Commissioner of the Court for a seven-year term commencing on 18 April 2017.

Four Acting Commissioners (Ms Lisa Durland, Mr Bob Hussey, Mr Craig Miller and Ms Sharon Sullivan) did not seek reappointment at the expiry of their terms and have retired.